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IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. P. V. RAJAMANNAR, *Chief Justice* AND MR. JUSTICE PANCHAPAKESA AYYAR.

A. St. Arunachalam Pillai, Proprietor, Vinayagar Transport, Woriyur, Trichy Dist. .. *Appellant**

v.

Southern Roadways Madurai, by Managing Director T. S. Krishna and another .. *Respondents.*

Constitution of India (1950), *Article* 226—*Discretionary relief—Petitioner acquiescing in the wrong complained of—If estopped from questioning it—Principle.*

Motor Vehicles Act (*IV of* 1939), *section* 64-*A—Power of Government under—If can pass an order in revision which the original Tribunal had no jurisdiction to pass.*

It is true that in exercising the discretion vested in the High Court whether to grant or not an extraordinary remedy like the issue of a writ, the conduct of the petitioner in acquiescing in the wrong complained of is a relevant factor. But before a person could be refused the relief, he is otherwise entitled to, on the ground of acquiescence, it is necessary to establish that he knew or ought to have known his rights. A person who had no knowledge of his rights and is not guilty of culpable negligence in being ignorant cannot be denied the relief under Article 226 of the Constitution.

Where the acquiescence complained of is due to a wrong view of the law, generally held by all parties concerned and the Court, which is held to be wrong subsequently, it is not just to apply the rule of acquiescence. In such circumstances, it is also open to the Court of first instance to permit a petitioner to raise the plea even though it is not stated in the affidavit in support of the petition.

It is no doubt true that under section 64-A of the Motor Vehicles Act the Government either *suo motu* or on application made to them call for the records of any subordinate authority and pass such orders in reference thereto as they deem fit. But this does not mean that the Government could pass an order in revision which the Tribunal of first instance itself had no jurisdiction to make. Where the Regional Transport Authority itself had no jurisdiction under the Motor Vehicles Act to grant a variation of a route permit, the Government cannot as revising authority under section 64-A of the Act, grant such a variation. The Government has no original jurisdiction of their own under section 64-A of the Act.

Appeal under clause 15 of the Letters Patent against the Order of the Honourable Mr. Justice Rajagopalan, dated 3rd September, 1956 and made in the exercise of the Special Original Jurisdiction of the High Court in W.P. No. 2 of 1956 presented under Article 226 of the Constitution of India to issue a writ of *certiorari* calling for the records relating to G.O. Ms. No. 3702, Home Department, dated 28th December, 1955 and to quash the same.

G. R. Jagadeesan, *T. R. Ramachandran* and *K. Tirumalai*, for Appellant.

V. K. Thiruvenkatachari (The Advocate-General) assisted by *N. R. Govindachari*, for 1st Respondent.

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* W.P. No. 110 of 1956. 17th July, 1957.

The Judgment of the Court was delivered by

Rajamannar, C.J.—This is an appeal against the judgment of Rajagopalan, J., in Writ Petition No. 2 of 1956. The appellant is the proprietor of Sri Vinayagar Transports, Woriyur, Tiruchirappalli. He held a permit to ply his bus M.S.P. 1519 on the route Tiruchirapalli Mainguard Gate to Tiruchirappalli Railway Junction *via* Palakarai and Round Tana. On the 19th July, 1954, he applied to the Regional Transport Officer, Tiruchirappalli, for variation of the route so as to ply between Mainguard Gate and Golden Rock *via* Palakarai, Round Tana, Tiruchirappalli Railway Junction and retrace again to Round Tana and thence to Golden Rock. The variation was sought mainly on the ground that it would provide direct transport facilities from Golden Rock to Tiruchirappalli Railway Junction. The Regional Transport Officer, Tiruchirappalli, notified this application for variation and called for representations. Messrs. Southern Roadways, Limited, a limited company doing motor transport business on a large scale, the contesting respondent before us, objected to the variation on the ground that it was not in public interest. Three other transport operators also objected to the grant of the variation. The Regional Transport Officer, Tiruchirappalli, after hearing the applicant and the objectors, rejected the application of the appellant by his order dated 17th July, 1955. It is not necessary to set out the reasons for his decision which are contained in the order. Against this order, the appellant presented a revision petition to the Government of Madras under section 64-A of the Motor Vehicles Act, praying that the order of the Regional Transport Officer may be set aside and the variation granted. The respondent company filed a statement before the Government maintaining the legality, regularity and justice of the order sought to be revised. The Government, by their order G.O. No. 3702 (Home) dated 28th December, 1955, set aside the order of the Regional Transport Officer and directed the grant of the variation sought by the Appellant. Thereupon the respondent filed in this Court a petition under Article 226 of the Constitution out of which this appeal arises, for the issue of a writ of *certiorari* to quash the said order of the Government. This petition was filed on 2nd January, 1956. It may be mentioned that the grounds on which the writ was sought, all related to the merits. The petition was opposed by the appellant.

When the petition came up for hearing before Rajagopalan, J., learned counsel for the respondent raised a new plea, *viz.*, that the Regional Transport Officer had no jurisdiction to grant the variation asked for by the appellant and the Government had likewise no jurisdiction to grant, in revision, what the Regional Transport Officer himself could not have granted.

This contention was put forward obviously because subsequent to the filing of the petition, a Division Bench of this Court held in Writ Appeal No. 107 of 1955 that the Regional Transport Officer had no jurisdiction to deal with an application for variation of a route. The appellant's learned counsel urged before Rajagopalan, J., that the respondent should not be permitted to put forward a new plea not disclosed in the affidavit. He also contended that as the respondent had submitted to the jurisdiction of the Regional Transport Officer, he should not be permitted at that stage, and in proceedings under Article 226 of the Constitution, to challenge the jurisdiction of the Regional Transport Officer. The learned Judge was of the opinion that the respondent's failure to raise the plea of jurisdiction in the affidavit in support of the writ petition could be easily condoned because the legal position was cleared up only when the decision in Writ Appeal No. 107 of 1955 was rendered by the Division Bench and till then everyone concerned proceeded on the assumption that the Regional Transport Officer had jurisdiction. He also considered that in the circumstances of the case the respondent could not be held to have disabled himself from seeking the discretionary relief of a writ of *certiorari* by his participation in the enquiry by the Regional Transport Officer without objecting to his jurisdiction. Following the decision in Writ Appeal No. 107 of 1955, the learned Judge held that the Regional Transport Officer had no jurisdiction to deal with the appellant's application for variation, and that it followed that the Government had equally no jurisdiction to grant the variation on a revision petition filed

against the order of the Regional Transport Officer. On this ground, he set aside the order of the Government dated 28th December, 1955, without going into the other contentions put forward by the respondent because " that might embarrass the competent statutory authority should an application be made to it hereafter for the variation ". The appeal before us is against this order of Rajagopalan, J.

At the outset it may be pointed out that though there was an attempt to question the correctness of the decision in Writ Appeal No. 107 of 1955, that attempt was abandoned at the hearing of this appeal, because that decision was affirmed by a Full Bench of this Court since reported in *Krishnaswami Mudaliar* v. *Palani Pillai*[1]. (Writ Appeals Nos. 56 and 57 of 1956 on 12th April, 1957). Before us the argument proceeded on the footing that the Regional Transport Officer, Tiruchirappalli, had no jurisdiction to deal with the appellant's application for variation.

Mr. G. R. Jagadisa Ayyar, learned counsel for the appellant, pressed upon us two main contentions. The first contention was the respondent had submitted to the jurisdiction of the Regional Transport Officer, and therefore he could not at a later stage, obtain the discretionary writ of *certiorari* on the ground that there was lack of jurisdiction. In support of this contention, he relied on the following passage in the recent judgment of the Supreme Court in *Pannalal Binjrai* v. *Union of India*[2].

" There is moreover another feature which is common to both these groups and it is that none of the petitioners raised any objection to their cases being transferred in the manner stated above and in fact submitted to the jurisdiction of the Income-tax Officers too when their cases had been transferred. It was only after our decision in *Bidi Supply Co.* v. *The Union of India*[3] was pronounced on 20th March, 1956, that these petitioners woke up and asserted their alleged rights, the Amritsar group on 20th April, 1956, and the Raichur group on 5th November, 1956. If they acquiesced in the jurisdiction of the Income-tax Officers to whom their cases were transferred, they were certainly not entitled to invoke the jurisdiction of this Court under Article 32. It is well-settled that such conduct of the petitioners would disentitle them to any relief at the hands of this Court (*Vide* Halsbury's Laws of England, Volume II, 3rd edition, page 140, paragraph 265 ; *Rex* v. *Tabrum* : Ex parte Dash[4] ; *O. A. O. K. Lakshmanan Chettiar* v. *Corporation of Madras*[5]".

He also referred us to two decisions of Subba Rao., J., as he then was in Writ Petition No. 806 of 1951 and *Mannarg Lal Union Motor Services, Ltd* v. *The Regional Transport Authority, Malabar and others*[6].

The above rule merely enunciates the principle which should be applied in exercising the discretion vested in the Court to grant or not an extraordinary remedy like the writ of *certiorari*. The rule is founded on the conduct of a party, which should be such as to disentitle him to the discretionary relief. The rule is really an instance of the doctrine of " acquiscence ". Now it is well-established that before a person aggrieved is refused a relief to which he would otherwise be entitled on the ground of acquiescence in the wrong complained of, it is necessary to establish that he knew, or ought to have known, his right, which he is alleged to have omitted to assert. A person who has no knowledge of his right and is not guilty of culpable negligence in being ignorant, will not be denied a relief to which he is entitled on the ground that he omitted to assert that right. In this case, as the learned Judge has pointed out, " the ignorance of the true legal position was virtually shared by everyone concerned, the operators, the statutory authorities and the Government themselves and even this Court ". In such circumstances, it is not just to apply the rule of acquiescence.

In this view it is not necessary to decide if the rule will not apply to cases where there is an initial want of jurisdiction in the tribunal, the act of which is complained against ; vide *Madhava Rao* v. *Surya Rao*[7].

Mr. Jagadisa Ayyar for the appellant took objection to the permission granted by the learned Judge to the respondent to raise this new plea which was not raised in the original affidavit in support of the petition. Reliance was placed by him on

1. (1957) 2 M.L.J. 243 (F.B.).
2. A.I.R. 1957 S.C. 396 at 412.
3. A.I.R. 1956 S.C. 479.
4. (1907) 97 L.T. 551.
5. (1926) 51 M.L.J. 742 : I.L.R. 50 Mad. 130 (F.B.).
6. A.I.R. 1953 Mad. 59.
7. (1953) 2 M.L.J. 340 at 342 (F.B.).

certain *obiter dicta* in an unreported judgment of a Division Bench in Writ Appeal No. 97 of 1955. There the new plea was not raised before the learned Judge who dealt with the writ petition, but it was raised for the first time in appeal before the Division Bench, and the new plea was not allowed to be raised at that stage. Different considerations would apply at the stage of the first hearing of the petition. We think that the learned Judge exercised his discretion most properly in allowing the plea to be raised.

Mr. Jagadisa Ayyar's next contention on behalf of the appellant was that even if the Regional Transport Officer had no jurisdiction to deal with the appellant's application for variation, the order of the Government which was sought to be quashed could not be said to be one passed without jurisdiction, or in excess of jurisdiction because the Government had undoubtedly powers to pass the order in question under section 64-A of the Motor Vehicles Act. Section 64-A of the Motor Vehicles Act runs thus :—

"The Provincial Government may, of its own motion or on application made to it, call for the records of any order passed or proceeding taken under this Chapter by any authority or officer subordinate to it, for the purpose of satisfying itself as to the legality, regularity or propriety of such order or proceeding and after examining such records, may pass such order in reference thereto as it thinks fit."

It cannot be denied that the Government could *suo motu* or on application made to them, call for the records of any order passed by any authority, or officer, subordinate to them ; and the Regional Transport Officer would be an officer subordinate to the Government. But that could be only for the purpose of satisfying themselves as to the legality, regularity, or propriety of such order. And, after examining the records, the Government could pass such order in reference thereto as they thought fit. In the present case, the Government should have found that the order passed by the Regional Transport Officer was not legal because he had no jurisdiction to pass the order he did. Once the Government came to that conclusion, there was nothing further which they could do than to set aside the order of the Regional Transport Officer and refer the applicant to the proper authority. There is nothing in the Act, or in the rules, which empowers the Government to deal originally with an application for variation. They cannot therefore treat the revision petition of the appellant as an application made to them for variation and proceed to dispose of it in the first instance. The fact that the Government is the final revising authority, does not carry with it the implication that the Government has original jurisdiction to deal with applications which properly should be dealt with, in the first instance by one or other of the several transport authorities. Of course if the subordinate authority or officer had jurisdiction to entertain an application and had passed an order thereon, it would be open to the Government to set aside that order and pass, instead, the proper order which that authority or officer should have passed.

The learned Advocate-General who appeared for the respondent put forward his objection to Mr. Jagadisa Ayyar's contention from another aspect. If the original order of the Regional Transport Officer was without jurisdiction and therefore void *ab initio* it followed that the order of the Government purporting to be in exercise of the revisional powers under section 64-A of the Act, would be equally without jurisdiction. Put so broadly, the proposition may not be correct in its application to all orders of Government passed in revision. If a revision petition is filed to the Government against an order of a subordinate officer on the ground that that officer had no jurisdiction to pass the order, the Government can certainly pass a valid order under section 64-A of the Act holding that the order of the subordinate officer is illegal and therefore should be set aside. In that case the argument that if the original order was without jurisdiction, the order of the Government passed in revision would equally be without jurisdiction, will not hold good. If, however, the Government purport to pass an order confirming or modifying the order of the subordinate officer, or if the Government pass an order in substitution of the order of the subordinate officer, on the ground that that was the proper order which he should have made, then the order of the Government would be void if the original order of the subordinate officer was void. It is suffi-

cient to refer to the following observations of Denning, L.J., in *Barnard* v. *National Dock Labour Board*[1]:

"So far as the decision of the appeal tribunal is concerned, it seems to me that, once the port manager's order is found to be a nullity, it follows that the order of the appeal tribunal is also a nullity. The appeal tribunal has no original jurisdiction of its own; it cannot itself make a suspension order; it can only affirm or disaffirm a suspension order which has already been made. If none has been made because it is a nullity, the tribunal can do nothing. It cannot make something out of nothing any more than anybody else can."

In the case before us the Government, as the revising tribunal, had no original jurisdiction of their own. They could not themselves make an order of variation.

Mr. Jagadisa Ayyar relied on an unreported decision of this Court in L.P.A. No. 200 of 1952. But when the facts of that case are examined, it will be clear that there is nothing in that decision which would materially assist him. In that case, an operator who had two stage carriage permits in respect of a particular route, applied to the Regional Transport Authority for extension of the route. The application for variation of the condition of the permit was referred to the Central Road Traffic Board which did not accept the request for extension. The Regional Transport Authority followed the procedure laid down in section 57 of the Act treating the application as an original application for a permit. The Regional Transport Authority eventually rejected the application mainly on the ground that the Central Road Traffic Board had not approved the proposal. There was an appeal to the Central Road Traffic Board against this order of the Regional Transport Authority; but the Board dismissed the appeal as not maintainable. The applicant thereupon invoked the powers of the Government under section 64-A of the Act. The Government passed an order directing the extension of the Route. It was *inter alia* contended that the only body which had the authority to vary any of the conditions of a permit was the Central Road Traffic Board and that the Regional Transport Authority had no jurisdiction to entertain the application for variation, and that therefore the Government had equally no jurisdiction under section 64-A of the Act to pass the order sought to be quashed. The answer to this contention was twofold: (1) that it could not be said that the Regional Transport Authority had no jurisdiction to deal with the application for variation of a condition as an application for the grant of a pucca permit; and (2) assuming the Central Road Traffic Board was the proper authority to deal with an application for variation of a condition, it had in effect refused to grant it and therefore the Government had power to interfere, with the order passed by the Central Road Traffic Board under section 64-A of the Act. It was observed in that case that "the order of the Government, can therefore be treated as an order passed in effect revising the order of the Central Road Traffic Road refusing to vary the condition of the permit under section 48-A". In that case either the Regional Transport Authority or the Central Road Traffic Board had authority to deal with an application for variation. One of the two authorities therefore had jurisdiction to deal with the application and the final order of the Government passed under section 64-A could be treated as an order in substitution of the order of either of the two authorities which had jurisdiction. There is nothing like that in the case before us because the only authority which dealt with the appellant's application was the Regional Transport Officer who had no jurisdiction to entertain it.

We are clearly of opinion that the order of the Government purporting to grant the appellant's application for variation in supersession of the order of the Regional Transport Officer refusing it was void because the Government had no original jurisdiction to make such an order and they could not make any order in lieu of the order made by the Regional Transport Officer because that officer himself had no jurisdiction to deal with the application. Rajagopalan, J., was therefore right in setting aside the order of the Government. The appeal is dismissed; but having regard to the fact that this point was raised subsequent to the filing of the writ petition, we make no order as to costs.

R.M. ——— *Appeal dismissed.*

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1. L.R. (1953) 2 Q.B. 18.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE RAMASWAMI.

Arumugam Solathirayar .. *Petitioner**

v.

Ponnalagu Pandrar and others .. *Respondents.*

Criminal Trial—First Information Report—Nature and purpose of—Offence of rioting—How proved—Infirmities in the First Information Report—Effect.

The First Information Report in a criminal investigation is not the beginning and ending of every case. It is only a complaint which sets the machinery of law in motion. Hence the mere fact that the names of some witnesses or the name of one accused out of several is not mentioned in it is not ground in itself for disbelieving the entire prosecution story even with regard to the witnesses or accused whose names are mentioned in it.

In cases of rioting it is not necessary to prove that every fact spoken of by the witnesses had a corresponding injury on some one. It is enough if the prosecution produces an acceptable volume of evidence to establish the motive and the overt acts which are spoken to by more than one witness. There are bound to be some immaterial discrepancies in the testimony of these witnesses and that is no reason to disbelieve the prosecution.

Petition under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the Order of the Court of the Judicial Sub-Magistrate, Kiranur, dated 29th September, 1956 and made in C.C. No. 638 of 1956.

N. Srivastsamani, for Petitioner.

G. K. Subramaniam for Respondents.

V. V. Radhakrishnan, for Public Prosecutor (*P. S. Kailasam*) on behalf of the State.

The Court made the following

ORDER.—This is a revision which has been preferred against the acquittal by the Judicial Sub-Magistrate, Kiranur, in C.C. No. 638 of 1956.

The case for the prosecution was that on 20th May, 1956, at about 7-30 A.M., near Mothudayanpatti, the accused armed with sticks, formed themselves into an unlawful assembly with the common object of assaulting and causing hurt to Armugham Solagar (P.W. 1) and his men and in pursuance of that common object, the accused committed the offence of rioting and in the course of the rioting injuries were caused to P.Ws. 1 to 3, 5 and 6.

This is a police prosecution and in support of the prosecution case as many as 13 witnesses were examined. Out of these 13 witnesses P.Ws. 1 to 3, 5, 6, 8, 9 and 13 are eye-witnesses. P.Ws. 1 to 3, 5 and 6 are the injured persons. P.W. 9 is a servant of P.W. 7, and P.W. 13 turned hostile.

The case for the accused was as follows : Accused 1 to 14 and 16, stated that they did not beat P.Ws. 1 to 3 and 5 and 6. Accused 15 stated that he did not instigate the other accused to beat P.Ws. 1 to 3, 5 and 6.

On behalf of the accused, three witnesses were examined and their evidence has been summarised by the Sub-Magistrate in paragraph 15 of his judgment as follows :

"D.W. 1's paternal uncle's son Nanjan *alias* Ramasami Thetenandar died on Saturday, 6th Vaigasi, in his house at Kilayur. D.W. 1's house is opposite Nanjan's house. On Saturday night D.W. 1 slept on the pial of Nanjan's house. On Sunday morning 2¼ naligais before daybreak P.Ws. 1 to 3, 5 and 6 and some others came to Nanjan's house to commit theft of Nanjan's properties. D.W. 1 took a stick from the thatti and beat P.Ws. 1 to 3 5 and 6; D.W 2 who had come to his sister's house at Kilayur came to Nanjan's house on hearing noise. On Sunday morning D.Ws. 1 and 3 saw P.Ws. 1 to 3, 5 and 6 going in a cart to Udayalipatti from one Sivasami's house."

The learned Sub-Magistrate acquitted the accused and hence this revision.

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*Cr.R.C. No. 183 of 1957. 19th July, 1957.
(Cr.R.P. No. 180 of 1957).

There can be no doubt that the acquittal by the learned Sub-Magistrate cannot at all be supported. In fact, his conclusion appears to be thoroughly perverse and devoid of any reasoning. It does not flow from the evidence. The occurrence has been spoken to by the eye-witnesses P.Ws. 1 to 3, 5, 6, 8, 9 and 13; out of them, P.Ws. 1 to 3, 5 and 6 are the injured persons and for which medical certificates are forthcoming. P.W. 4, Dr. Srinivasan, has been examined. In fact, the learned Magistrate himself states that there can be no doubt that P.Ws. 1 to 3, 5 and 6 received injuries. The prosecution has also put forward adequate motive for the commission of the offence. Information of the offence has been given of this rioting and the police have investigated the case and put up the charge-sheet. Only one of the witnesses examined out of the category of eye-witnesses has not supported the prosecution case; the others have spoken to the main facts set out in the charge-sheet. The names of P.Ws. 9 and 13 are mentioned in the first information report as eye-witnesses. It is only the name of P.W. 8 that has not been mentioned in it. The allegation that he is a servant of P.W. 7 has also been denied. Turning to the accused, the names of all the 15 accused are mentioned in the first information report only the name of accused 16 is not mentioned. In other words, we have got a volume of evidence in support of the prosecution story.

I have already reproduced the evidence of the three defence witnesses as summarised by the Sub-Magistrate. One moment's reflection will show that whatever might be the grounds for acquitting the accused, it cannot certainly be on the strength of the defence evidence that the case has got to be thrown out. In fact, the learned Sub-Magistrate himself has not pretended to do so on account of the defence evidence. He has not even considered the defence evidence and the value to be attached to that evidence. The reasons given by the Sub-Magistrate consists of a series of cliches which inexperienced Sub-Magistrates are prone to repeat being mentioned at the Bar *ad nauseum* in Magisterial Courts. The two reasons given by the Sub-Magistrate are that he cannot believe the eye-witnesses because out of them P.Ws. 1 to 3, 5 and 6 are the injured persons and interested. P.W. 9 is a servant of P.W. 7 and the evidence of the others are exaggerated because for every fact spoken to by them, there is not a corresponding injury in the medical certificate and that, therefore, the prosecution version is an exaggerated one; and consequently, it was not safe to rely on that evidence and convict the accused. He purported to give what he called the benefit of doubt to the accused. I am sure that a Magistrate with a greater amount of experience would not have fallen into all these pitfalls. The fact that in the first information report the name of one accused is not mentioned or the names of some witnesses are not mentioned is no ground for disbelieving the prosecution story and acquitting the accused whose names are mentioned in the first information report and disbelieving witnesses whose names are mentioned in the first information report. The first information report is not an encyclopaedia. It is not the beginning and ending of every case. It is only a complaint to set the officers of law and order in motion. It is only at the investigation stage that all the details can be gathered and filled up. So to reject the story on the ground of first information report is to show an inadequate appreciation of criminal investigation and the weight to be attached to evidence in criminal cases.

Then it is a habit with the Madras ryots as has been pointed out in more than one Judgment of this Court not to merely say there was a row and all these persons took part in the offence but to work out an elaborate analysis of left-sides and right-sides and fists and feet. It does not mean one must find corresponding injury to every fact spoken to by them. It is not a case of every bullet finding its billet. This is an expression of speech with these ryots who are illiterate and who in the stress of emotion observe things from different angles and speak to various acts. On the other hand, the broad probabilities have got to be considered whether these accused persons had a motive to commit the offence, whether they participated in the commission of the offence, whether the particular act attributed to them is spoken to by more than one witness and finally we must consider the defence put forward by the accused and its validity by testing the prosecution version.

I am afraid that the learned Magistrate has completely misdirected himself and had made a wrong approach of this case when he got himself obsessed with examining the medical certificate to find out whether every corresponding act spoken to by each witness finds a corresponding injury in the medical certificate. He has lost sight of the wood in the midst of trees and immaterial discrepancies have been elevated to the rank of falsehoods. On the other hand, in all these rioting cases where people observe under stress and emotion, an occurrence, for a short space, from different angles with different temperaments, capacity to observe, intelligence and memory powers, such discrepancies are bound to occur. They show only the untutored veracity of the witnesses. On the other hand, if there are not discrepancies in such cases we must always suspect confederacy and concoction beforehand.

It is unnecessary to multiply these details to show that there were no grounds at all for this Magistrate to come to the conclusion that it was a case of giving the benefit of the doubt to the accused. Benefit of doubt is not a formula for shirking the task of Magistrates to grapple with the facts and give definite conclusions of their own. In fact section 3 of the Indian Evidence Act lays down :

> "A fact is said to be proved when, after considering the matters before it, the Court either believes it to exist or considers its existence so probable that a prudent man ought under the circumstances of the particular case to act upon the supposition that it exists."

In other words, so long as there is a volume of acceptable evidence and which is sought to be rebutted, it is the duty of the Magistrate to apply his mind to those facts, analyse the evidence to find out whether the prosecution has affirmatively and satisfactorily proved its case, making use of the defence evidence for the purpose of testing whether the prosecution case can be true. Then and then only if there is a reasonable doubt that the offence has not been brought home, beyond moral certainty, in accordance with the merciful jurisprudence which we administer, we are bound to give the benefit of the doubt to the accused. In other words, to use Lord Kenyon's homely phrase :

> "If the scales of evidence hang anything like even to throw into them some grains of mercy; or as it is more commonly put to give the prisoner the benefit of any reasonable doubt. Not be it noted of every doubt (for everything relative to human affairs and dependent on human evidence is open to some possible or imaginary doubts).
>
> It is the condition of the mind which exists when the Judges and Magistrates cannot say that they feel an abiding conviction, a moral certainty of the truth of the charge."

In these circumstances the acquittal by the lower Court cannot at all be supported. The order of acquittal is set aside and the learned District Magistrate is directed to further enquire into the matter either by himself or by a Magistrate appointed by him in this behalf, other than the Magistrate who has so unsatisfactorily disposed of this case.

R.M. ——— *Acquittal set aside.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE SOMASUNDARAM.

Public Prosecutor .. *Appellant**

v.

A. D. Sabapathi and another .. *Respondents.*

Penal Code (XLV of 1860), section 292—Offence of publishing obscene matter—What constitutes—Mere defamatory article—If by itself amounts to obscene matter also.

What is 'obscenity' is not defined by the Penal Code. But Courts have laid down that the word 'obscene' should be given its ordinary and literal meaning, *viz.*, repulsive, filthy, loathsome, indecent and lewd. But every indecent or filthy article will not come within the scope of obscenity punishable under section 292 of the Indian Penal Code.

In order that an article should be obscene it must have the tendency to corrupt the morals of those in whose hands it may fall. The mere fact that an article is highly defamatory of certain persons

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* Cr. Appeals Nos. 470 and 471 of 1956. 24th October, 1957.

referred to therein or is so highly indecent that no decent person will indulge in such writings, will not by itself make them necessarily 'obscene' also. Though all obscene articles will be either filthy, indecent or repulsive every filthy or indecent article may not necessarily come within the mischief of 'obscenity'.

* Appeals under section 417 of the Code of Criminal Procedure, 1898, against the acquittal of the aforesaid Respondents (Accused) by the Chief Presidency Magistrate, Egmore, Madras, in C.C. Nos. 1156 and 1157 of 1956 on his file respectively.

The Public Prosecutor (*P. S. Kailasam*), Appellant in both.

V. Gopinathan and *A. S. Krishnamurthi*, for Respondent in C.A. No. 470 of 1956.

The Court delivered the following

JUDGMENT.—These are appeals against the orders of acquittal passed by the Chief Presidency Magistrate in C.C. Nos. 1156 and 1157 of 1956 on his file. The accused are editor and publisher and printer respectively of a Tamil Weekly known as "Cinema Nesan". They are charged under section 292, Indian Penal Code, for having published and printed articles which are alleged to be obscene in character. The articles have appeared in the issues of the journal dated 18th November, 25th November and 9th December of 1955. The articles purport to describe the conduct of several film stars in association with some other persons. In short the allegations in these articles are that the film stars mentioned by him are prostitutes. They give names of several persons with whom the film stars go about, suggesting the relationship between them is anything but fair and honest. The question is whether such an article will come within the definition of obscenity. Obscenity is not defined in the Code. But decisions of our Court clearly show that it should be given its ordinary and literary meaning. The dictionary meaning of the word 'obscene' is repulsive, filthy, loathsome, indecent and lewd. The fact that a decent person will not publish certain articles or will not indulge in certain indecent writings does not necessarily mean that the indecent articles will become at once obscene articles. In order that an article should be obscene, it must have the tendency to corrupt the morals of those in whose hands the article may fall. A reading of the articles in question will not, in my opinion, have the tendency to deprive the moral of any person, young or old. The articles are undoubtedly highly defamatory of the persons referred to therein; and no decent person will indulge in defaming persons in the manner in which the accused have done. In that sense the articles are indecent and disgusting to cultured minds. They are in one sense filthy in that they offend the susceptibilities of cultured persons. It is one thing to call them indecent and another thing to say that they are obscene. In my opinion, these articles however indecent they may be to cultured minds, will not fall within the scope of obscenity. As already pointed out, it is not every filthy or indecent article that will become obscene, though all obscene articles will be either indecent or filthy or repulsive. The lower Court is right in coming to the conclusion that the articles are not 'obscene'. The acquittal is well justified. The appeals are dismissed.

R.M. ——— *Appeals dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE PANCHAPAKESA AYYAR.

S. J. Nathan .. *Appellant.**

Madras City Civil Court Act (VII of 1892) as amended by Madras Act (X of 1955), section 15 (2)—Suit for account valued at below Rs. 5,000—Decree for an amount higher—Forum of appeal.

A suit for accounts valued in the plaint at Rs. 100 was decreed against the defendant for over Rs. 8,000 and the defendant filed an appeal in the High Court against the said decree and judgment valuing the appeal at the amount decreed against him.

Held, the proper forum for the appeal will be the principal City Civil Court under section 15 (2) of the Madras City Civil Court Act as amended by the Amending Act X of 1955. Where such an appeal has been wrongly filed in the High Court the papers should be returned for presentation to proper Court and if it will be out of time before that Court it will be a fit case for excusing the delay.

* Appeal—S.R. No. 27148 of 1957. 10th October, 1957.

Appeal sought to be filed against the decree of the Second Assistant City Civil Judge of the City Civil Court of Madras, dated 27th March, 1956 and passed in O.S. No. 1390 of 1949. Put up by the office with the following

Note :—This unregistered City Civil Court Appeal is sought to be preferred in this Court against the final decree passed by the Second Assistant Judge of the City Civil Court, Madras, in O.S. No. 1390 of 1949, a suit for accounts valued in the plaint at Rs. 100. The appeal which is by the Defendant is valued at Rs. 8,486-11-10 being the amount decreed against him with interest and costs impugned by him as having been awarded in excess by the lower Court. The decree being one passed by an Assistant Judge in a suit valued at Rs. 100 the appeal would *prima facie* lie only to the Principal Judge of the City Civil Court by virtue of section 15 (2) of the Madras City Civil Court Act, 1892 (Central Act VII of 1892) as amended by Madras Act X of 1955. The appeal was presented in this Court on the 87th day computed according to the certified copy of the decree filed as enclosure and would obviously have been out of time if presented on the same day in the City Civil Court wherein the period of limitation has been fixed as 30 days only under section 15 (4) of the amended City Civil Court Act aforesaid. As the Advocate for the Appellant contends that this Court has jurisdiction to entertain the appeal on the two grounds set out *infra*, it has become necessary to post the matter for a decision by Court on the question of jurisdiction.

The first contention of the Appellant's Advocate is that whatever the value of the suit, an appeal lay only to the High Court prior to the amendment and that this vested right of appeal cannot be taken away by the amendment. Though this cannot be disputed, it is also well recognised this vested right of appeal can be taken away by a subsequent enactment if it so provides expressly or by necessary intendment. The principles governing the existence of this vested right have been succinctly laid down by a recent decision of the Supreme Court delivered on 1st February, 1957 and reported in *Garikipati* v. *Subbiah Choudhury*, (1957) S.C.J. 439 : (1957) 2 M.L.J. (S.C.) 1 : (1957) An.W.R. (S.C.) 1 : A.I.R. 1957 S.C. 543 at 553 (para. 23) after discussing the earlier decisions. Attention is also invited to the recent Bench decision of this Couert reported in *Parthasarathi Naidu*, In re, (1957) 2 M.L.J. 250 wherein also the above principles were applied and it was held that the recent amendment to section 13 of the Madras Civil Courts Act, 1873, enhancing the appellate jurisdiction of the District Courts from Rs. 5,000 to Rs. 10,000 introduced by Madras Act XVII of 1956 was held to be retrospective in its application and would apply even to suits which had been instituted before the amending Act came into force. It is submitted that perusal of the transitory provision contained in section 8 of Madras Act X of 1955 (as amended by Madras Act XXIX of 1955) by which even the appeals pending on the file of the High Court on 1st July, 1955, which were within the cognizance of the Principal Judge under the provision of the aforesaid Madras Act X of 1955 stood transferred to the Madras City Civil Court would clearly show that the amended provision, section 15 (2) of the Madras Civil Civil Court Act is intended to be retrospective in operation. Hence, it appears obviously futile for the Advocate to contend that there is a vested right of appeal to this Court in a suit of the value of Rs. 100 disposed of by an Assistant Judge of the City Civil Court and that the criterion for determining the forum is not the subject-matter of the suit as in the Civil Courts Act but that the amount or value of the decree of the subject-matter of the appeal is the determining factor.

The Advocate's second contention is that section 15, sub-sections (1) and (2) of the amended Act contain the words "Suit or proceeding", that the decree under appeal herein has resulted in a "final decree proceeding" wherein the amount involved exceeds Rs. 5,000 and that whatever be the value of the suit, the appeal would lie to this Court only under sub-section (1) of section 15 aforesaid. It is submitted that the word "proceeding" occurring in the above sections has always been construed as an independent proceeding as opposed to a suit and not as a proceeding arising within the suit itself. Matters arising under Special Acts like the Arbitration Act and Hindu Marriage Act wherein the proceedings in Court are initiated by an original petition obviously fall in the category of "proceeding" above referred to. This contention of the Advocate is also opposed to the Full Bench decision of this Court reported in *Putta Kannayya Chetti* v. *Rudrachatla Venkata Narasayya*, (1916) 32 M.L.J. 221 : I.L.R. 40 Mad. 1 wherein it was held with particular reference to a suit for accounts like the present that the amount or value of the subject-matter as fixed in the plaint should determine the Court to which the appeal lies (*ibid.* 228).

It is therefore submitted that the appeal memo. has to be returned for presentation to the proper Court. As the Advocate however seeks a decision by Court, the matter is posted for orders of Court. Submitted.

R. S. Venkatachari, for Appellant.

The Court made the following

ORDER.—There is no doubt whatever that this appeal ought to have been filed in the Court of the Principal Judge of the City Civil Court. It was wrongly filed here though in *bona fide* error. It will be returned for presentation to the proper Court. The Appellant can file a petition in that Court to excuse the delay in the peculiar circumstances. It is a fit case to excuse the delay. Return the papers at once.

R.M. ——— *Papers directed to be returned.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE RAJAGOPALA AYYANGAR.

Abdul Khader .. *Petitioner**

v.

Messrs. Consolidated Coffee Estate (1943) Ltd., Pollibetta, Coorg, representing the management of Yemmigoondi Estate, Pollibetta P. O., South Coorg and others .. *Respondents.*

Industrial Disputes (Appellate Tribunal) Act, (XLVIII of 1950), *sections* 7 (1) (*a*) *and* 9 (7)—*Powers of Appellate Tribunal to interfere with order of Industrial Tribunal*—" *Question of law* "—*Order of dismissal of employee by employer after full inquiry for misconduct*—*Allegation of want of* bona fides *and victimisation found against*—*Power of Tribunal to go into justness of punishment inflicted by employer and set it aside for sake of harmony in relations between employer and employee and for securing industrial peace*—*Contractual obligations of employee*—*Binding character of*—*Industrial Disputes Act* (*XIV of* 1947), *sections* 10 *and* 11,

Though the application of the rules of law to the particular facts of a case might not itself give rise to a point of law, a misapplication of law would certainly give rise to a question of law.

Where the Industrial Tribunal has a discretion to interfere with the punishment inflicted by an employer on a workman only in stated circumstances, the question whether that test was satisfied or not would be a question of law on which the Appellate Tribunal can interfere. The discretion of the Industrial Tribunal if any to interfere with the punishment is a judicial discretion to be exercised on recognised principles and not an arbitrary one to be exercised at pleasure or capriciously, and therefore, it is not only the function but also the duty of the Appellate Tribunal, even though vested with jurisdiction to interfere only on questions of law, to see that the discretion of the Industrial Tribunal is not used arbitrarily or in a manner contrary to intelligible and acceptable principles.

A workman was dismissed by his employer for misconduct after a full inquiry and an appeal by the dismissed workman under the rules of service was unsuccessful. The Industrial Tribunal to whom the matter was referred at the instance of the union of employees, found that the charge against the workman was well founded and that he was guilty of the misconduct alleged and that the allegation of want of *bona fides*, unfair labour practice and victimisation had no basis. It however, set aside the dismissal of the employee and substituted for it a punishment of suspension for a period of six months on the ground that it would bring harmony into the relations between the employer and the employee and would conduce to industrial peace. The Labour Appellate Tribunal, on appeal by the employer, held that there was no justification for the Industrial Tribunal interfering with the dismissal which was justified and set aside the order of the Tribunal.

Held : that the Industrial Tribunal having erred in law the Appellate Tribunal was justified in interfering with its decision and that the Appellate Tribunal had not exceeded its jurisdiction and therefore no writ of *certiorari* could issue. The Industrial Tribunal had no jurisdiction to interfere with the punishment inflicted by the employer.

Held further, that Industrial Law itself had to function on the frame-work and basis of a social order which in great part rests on the sanctity and enforceability of obligations freely and voluntarily undertaken, and, even before Industrial Tribunals, the contractual obligations of employers and employees are binding and enforceable, though in the case of workmen, owing to the presumed inequality of labour *vis a vis* the employer, labour's contractual obligations are not strictly enforced. But it is wrong to assume that before Industrial Tribunals the obligations of the employer alone exist and that it is a *tabula rasa* so far as workmen are concerned. The proper approach is to proceed on the basis of contractual obligations, relieving the workmen of their strictness where the result achieved would be harsh and one to which the workmen would not have agreed if they were in a position to bargain on equal terms with the employer. The grounds of securing harmony between employer and workmen and of securing industrial peace cannot be regarded as an absolute bar precluding all enquiry by an Industrial Court into the propriety of the order of dismissal made by the employer.

Ranganathan v. *Madras Electric Tramways* (1904), *Ltd.*, (1952) 2 M.L.J. 805, considered and explained.

Petition under Article 226 of the Constitution of India praying that in the circumstances stated in the affidavit filed therewith the High Court will be pleased to issue a writ of *certiorari* calling for the proceedings and records relating to the decision of the Labour Appellate Tribunal of India at Madras, dated 14th June, 1955 in Appeal No. MDR 52/55 and quash the said decision.

B. R. Dolia, for Petitioner.

Pai and *Doraiswami* for *King* and *Partidge*, for 1st Respondent.

The Special Government Pleader (*V. V. Raghavan*), for 3rd Respondent.

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* Writ Petition No. 773 of 1955. 28th September, 195.

The Court made the following

Order.—This is an application for the issue of a writ of *certiorari* to quash an order of the Labour Appellate Tribunal in the following circumstances :

The petitioner was employed under the first respondent who was the owner of a coffee estate. The duties of the petitioner consisted in driving a tractor. At the time of his appointment, he was notified that he should not permit any other person to travel in the tractor or in any machinery attached to the tractor and that such conduct on his part would entail dismissal. On the 1st April, 1954, the petitioner was charged by the Management with having knowingly permitted one Natesan to ride on a tiller attached to the tractor. The petitioner denied the charge and stated that if Natesan was on the machine it was without his knowledge. There was an enquiry in consequence of this denial and at that enquiry it was proved that it was with the petitioner's knowledge that Natesan rode on the tiller. On the ground of misconduct involved in this act, the Management dismissed the petitioner from service. The rules of service of the petitioner provided an appeal to a higher authority within the Management itself. The petitioner availed himself of this further remedy but did not succeed. Thereupon, the Union, of which the petitioner was a member, started a dispute challenging the justness of the petitioner's dismissal from service. As it was not possible to effect a conciliation of this dispute, the matter was taken up to the Government who referred the dispute to adjudication under section 10 (1) (*c*) of the Industrial Disputes Act. Before the Industrial Tribunal, the Union put forward two contentions. The first was that the dismissal was not *bona fide* in that it involved an unfair labour practice as also that it was the result of victimisation of the petitioner ; and secondly, they pleaded that as a fact Natesan was carried on the tiller by the petitioner without his knowledge. Evidence was taken by the Tribunal and as a result, it negatived the allegations regarding unfair labour practice as well as victimisation. It also found that the charge made against the petitioner was well-founded. The question that then remained for consideration was as regards the justness of the punishment awarded by the employer. As regards this, the Tribunal, after citing a number of decisions, came to the conclusion that the punishment of dismissal was too harsh and was not justified by the circumstances, and substituted for the punishment inflicted by the employer one of suspension for a period of six months without pay.

The employer, the first respondent here, took the matter in appeal to the Labour Appellate Tribunal. Before this Appellate Authority, the Union raised the preliminary objection that no appeal lay to the Tribunal under section 7 (1) (*a*) of the Labour Appellate Tribunal Act for the reason that no substantial question of law was involved in the appeal. The Tribunal overruled this objection and after discussing the evidence in the case reached the same conclusion as the Tribunal as regards the charge being proved and also as regards the *mala fides* of the employer. The Appellate Authority, however, held that there was no justification for interfering with the order of dismissal passed by the employer, and differing in that respect from the Industrial Tribunal, modified its order and gave as its answer that the dismissal of the employee was justified. It is this order of the Labour Appellate Tribunal that is challenged before me as being beyond its jurisdiction.

The learned counsel for the petitioner-workman urged that the Appellate Tribunal had no jurisdiction to entertain the appeal or to interfere with the order of the Industrial Tribunal, as no substantial question of law was involved in the appeal, and on this ground, it was stated that the Labour Appellate Tribunal had exceeded its jurisdiction in judging the severity of the punishment and that in the circumstances of the case, the Appellate Tribunal was incompetent to interfere with the order of the Industrial Tribunal. It was further urged that as the Industrial Tribunal had stated that it was setting aside the punishment of dismissal inflicted by the employer and substituted therefor the punishment which it decided was the reasonable one, on the stated ground that that would bring harmony into the relations between the employer and the workmen and would conduce to industrial peace, it could not be interfered with in appeal. In this connection, reliance was

placed on a passage in the judgment of Subba Rao., in *Ranganathan v. The Madras Electric Tramways*[1]. The passage relied on was this :

> "The Tribunal (the Industrial Tribunal) is not bound by the contractual terms between the parties but could make a suitable award for bringing about harmonious relations between the employers and the workmen. . . . . It would obstruct the work of the Tribunal and prevent it from discharging its difficult task of bringing about harmonious relations between the parties. I would therefore hold that the Industrial Tribunal is not fettered by any such limitations on its power and the only limitation on its power is to bring about harmonious relationship between the employer and the workmen ".

This is not the first occasion when counsel appearing for workmen has relied on this passage as a charter to each adjudicator to substitute what he considered was fair and as affording legal justification for every order in favour of workmen, provided it was stated to be 'for securing industrial peace'. In my opinion, this proceeds on an entire misreading and misapprehension of what the learned Judge meant and arises out of the reading of this passage divorced from the facts of the case and the context in which its occurs. Subba Rao, J., was considering the right of an Industrial Tribunal to direct reinstatement of dismissed workmen and was repelling an argument which attached an inviolable sanctity to contractual rights. In that connection, the learned Judge said that contractual rights might not wholly determine the reliefs open to be afforded by an Industrial Tribunal. The words "for securing harmony between employer and workmen" or "for securing industrial peace" were certainly not meant to be a magical formula on the incantation of which an absolution was provided which precluded all enquiry into the propriety of the order.

It must not be forgotten that it is on the framework and basis of a social order which in great part rests on the sanctity and enforceability of obligations freely and voluntarily undertaken that Industrial Law itself has to function. Even before Industrial Tribunals, the contractual obligations of employers are binding and enforceable ; similarly the obligations undertaken by workmen ; only in their case, owing to the presumed economic inequality of labour *vis a vis* the employer, labour's contractual obligations are not strictly enforced, and the Tribunal can disregard them, having regard to the initial inequality between the two contracting parties. It is not, however, correct to assume that before Industrial Tribunals, the obligations of the employer alone exist and that it is a *talbula rasa* so far as workmen are concerned. The proper approach, therefore, is to proceed on the basis of contractual obligations, relieving, however, the workman of their strictness, where the result achieved would be harsh and one to which the workmen would not have agreed, if they were in a position to bargain on equal terms with the employer.

The question which the Industrial Tribunal was called on to adjudicate in this case was the justness of the dismissal of the workmen on the facts which I have already stated. The condition as to not permitting others to ride on the machine was one which was not wholly in the interests of the employer but was designed in the interests and safety of human beings. This would show the serious effect of any disregard of these instructions and the fact that an undertaking was taken from the workman, that if he disobeyed these instructions he was liable to dismissal, was with a view to bring home to the workman the peril involved in any departure from the rule. That condition was in the present case, on the finding of the Tribunal, deliberately broken. The *bona fides* of the employer in preferring a charge was impugned; but that was negatived. The employee also pleaded that Natesan rode on the vehicle without his knowledge ; that also had been found against. There had been a full-fledged enquiry into the charge by the employer and the charge was held established. It was on those findings that the employee was dismissed and it was in those circumstances that the dispute came before the Tribunal. The Tribunal rejected every contention regarding the *mala fides* of the employer as also the case of the employee on the merits and held that the workman was guilty of the misconduct regarding which there was no dispute that it was serious.

1. (1952) 2 M.L.J. 805.

On these findings, the punishment inflicted by the employer would have had to stand unless on some intelligible grounds, the Tribunal reached the conclusion that it was unreasonable and excessive. I do not find learned counsel for the petitioner disputing the position so far. But his contention was that if the Tribunal repeated the formula "that industrial peace required it" but without further elucidating it as to why the employer's discretion should be interfered with, its order could not be interfered with, and could raise no question of law for consideration by the Labour Appellate Tribunal. I am wholly unable to agree with this contention. No doubt, the application of the rules of law to the particular facts of a case might not itself give rise to a point of law. But on a mis-application of law, a question of law would certainly arise. If the Tribunal had a discretion to interfere with the punishment inflicted by the employer only in stated circumstances, the question whether that test was satisfied or not would be a question of law. Again, granting that the Tribunal had discretion in the matter, that was a judicial discretion to be exercised on recognised principles, not an arbitrary one to be exercised at pleasure or capriciously, and it was the function, and I would add the duty, of an Appellate Tribunal, even though vested with jurisdiction to interfere only on points of law, to see that the discretion is not used arbitrarily, or in a manner contrary to intelligible and acceptable principles.

In my judgment, the Appellate Tribunal had not exceeded its Jurisdiction and the order impugned cannot be set aside. The writ petition fails and is dismissed with costs. Counsel's fee Rs. 50.

P.R.N. ——— *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE RAJAGOPALA AYYANGAR.

S. V. S. Muhammad Yusuf Rowther and another .. *Appellants**

v.

Muhammad Yusuf Rowther and others .. *Respondents.*

Civil Procedure Code (V of 1908), section 100—Finding of fact—Concurrent finding of lower Courts that gift by Mahammadan donor was not brought about by undue influence and was not affected by Marz-ul-maut—Finality in second appeal—Finding arrived at by wrongly throwing onus of proof—Finality of—Plea not urged or put forward and not considered by lower Courts—If can be urged and considered in second appeal.

Practice—Issues—Absence of specific issue on plea—If bar to consideration of plea by Court for basing decision.

Muhammadan Law—Gift—Delivery of possession—Proof—Onus—Declaration by donor in deed—Effect of.

Where a deed of gift by a Mahammadan donor is challenged on the ground that it was got up by the exercise of undue influence on the donor at a time when, owing to advanced age, he was not able to take care of himself, as well as on the ground that the donor was seriously ill, as a result of which he was expecting to die and, therefore, the gift was affected by the rule of Marz-ul-maut, but the trial Court and the appellate Court find against these contentions the finding on both the points is one of pure fact and conclusive, and is not open to challenge in second appeal.

Delivery of possession of the gifted property is an essential condition of the validity of a gift and its operative nature under the Muhammadan law and it is for the donee to establish it. But a declaration by the donor in the deed of gift, of having parted with possession of the property gifted, is an admission as against the donor and binding upon him and those claiming under him.

Nurbai v. *Abraham Muhammad*, A.I.R. 1939 Bom. 449, distinguished.

Sheik Muhammad Mumtaz v. *Zubaida Jan*, (1889) L.R. 16 I.A. 205: I.L.R. 11 All. 460 (P.C.) and *Mohammad Sadiq Alikhan* v. *Fakhr Jahan Begam*, (1931) 62 M.L.J. 320: L.R. 59 I.A. 1 : I.L.R. 6 Luck. 556 (P.C.) followed.

Where the lower Courts fail to appreciate the evidentiary value of such an admission and hold that there was no delivery of possession by wrongly throwing the onus in such a case on the donee and base their decision against the donee on his not having discharged the burden of proof thus thrown upon him to establish delivery of possession, they commit an error of law, and the finding of the lower Courts, though concurrent, cannot be accepted as binding upon the High Court in second appeal.

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* Second Appeal No. 1060 of 1954 and
Memorandum of Cross Objections. 9th September, 1957.

A plea, though raised in the pleadings, but not made the subject of any issue and not considered or discussed in either of the Courts below, and which was never mentioned or suggested in the evidence nor put forward in the course of the arguments, must be deemed to have been abandoned and cannot be allowed or considered in second appeal. Where, however, a point is raised in the plaint and traversed in the writtem statement, and is also considered and discussed in the course of the trial and hearing, it can be considered and relied upon for basing the Courts' decision, though, no specific issue is raised on that point.

Appeal against the Decree of the District Court of Tiruchirappalli in Appeal Suit No. 226 of 1951, preferred against the Decree of the Court of the Subordinate Judge of Tiruchirappalli in Original Suit No. 135 of 1949.

T. S. Raghavacharlar, for Appellants.

G. R. Jagadisan and *T. S. Srinivasan*, for Respondents.

The Court delivered the following

JUDGMENT.—This second appeal arises out of a suit filed by respondents 1 and 2 as plaintiffs for partition and possession of their share of the properties left by one Muhammad Ismail Rowther who died on 3rd January, 1948, at an advanced age. Nearly a year before his death on 1st February, 1947, Muhammad Ismail executed a deed of gift conveying his properties to his two sons who were defendants in the suit. Besides these two sons Muhammad Ismail had two other daughters, Hamida Bi and Ayisha. The elder of these daughters Hamida Bi died on 28th September, 1948, leaving besides her husband a daughter. Hamida Bi's husband is the plaintiff in the suit while his minor daughter by Hamida Bibi is the 2nd plaintiff. The other daughter of Muhammad Ismail Ayisha Bibi has been impleaded as the 3rd defendant.

Substantially the case of the plaintiffs and the 3rd defendant, who naturally supported the plaintiffs by filing a statement accepting the plaint allegations, was that the gift deed dated 1st February, 1947, marked as Exhibit B-1 in the case did not constitute an effective disposition of Muhammad Ismail's properties with the result that at his death the properties still continued to be his and devolved on the four children who survived him and that on the death of Hamida Bibi a few months after Muhammad Ismail, the plaintiff became entitled to her share as her heirs.

I shall have to refer in some detail to the grounds upon which the gift deed was attacked. But at this stage it is sufficient to mention that the main and substantial grounds upon which its validity was impugned were too. The first was that the deed was got up by the exercise of undue influence on the donor by the donees at a time when owing to the advanced age he was not able to take care of himself. The other ground urged was that the donor was seriously ill as a result of which he was expecting to die with the consequence that the gift became affected by the rule of Marz-ul-Maut and that it could not have effect beyond a third. The learned Subordinate Judge as well as the learned District Judge on appeal have negatived both these grounds of attack and as the finding in relation to both is one of pure fact it is no longer open to challenge in the second appeal.

Having negatived these two grounds of the invalidity of the gift deed, however, the Courts below proceeded to afford relief to the plaintiff son the following basis.

The trial Court decreed the suit in its entirety for the reason that the contesting defendants—donees under the deed—had not positively established that possession of the gifted properties was delivered to them by the deceased after the execution of the deed and that this essential requirement of a valid donation under the Muslim Law had not been established. Defendants 1 and 2 filed an appeal to the learned District Judge, and while upholding the deed to the extent of the residential house which formed one of the items of donation, he confirmed the decree of the Subordinate Judge in regard to the rest of the properties which consisted of lands, etc. The reason for this distinction in regard to the items covered by the deed was that the father, the donor and his sons, the donees, were at the time of the donation jointly living in the house, and certain decisions had laid down that where the donor and the donee were closely related and were jointly residing in or in physical pos-

session of the property gifted, the donor need not remove himself from the property in order to validly effect delivery of possession, to satisfy this requirement of Muslim Law. It is from this decision of the learned District Judge that the second appeal has been filed.

Defendants 1 and 2 who challenge the correctness of the decision of the Courts below that the requirements of Muslim Law as to the delivery of possession to perfect a gift had not been complied with, have filed the appeal in relation to the lands regarding which a decree for partition has been passed in favour of the plaintiffs. The plaintiffs have filed a memorandum of objections challenging the correctness of the distinction drawn between the situation in relation to the house and the rest of the gifted properties.

Mr. Raghavachariar learned counsel for the appellants urged before me two grounds in support of the appeal. The first was that the Courts below were in error in considering the question as to whether the requirement of the Muslim Law as to delivery of possession had been satisfied or not. This contention was based on there being no specific issue raised as regards this point. Before the learned Subordinate Judge who tried this suit the issues that had been raised for trial, which are relevant in the present context are those numbered 1 to 3.

1. Whether the settlement deed was brought about by undue influence and is not valid and binding ?

2. Is it void of being a death-bed gift ?

3. To what shares are the parties entitled ?

The point in relation to there not having been delivery of possession of gifted properties was discussed by the trial Judge as part of issue 2. Mr. Raghavachari urged that on the terms of the issues as framed the only points that could have been considered were those relating to the gift being invalid by reason of undue influence and Marz-ul-Maut and that when once these were negatived the learned Subordinate Judge was bound to have dismissed the suit. I, however, consider that having regard to the course of the trial and the manner in which the parties understood the case that they had to meet, learned counsel is not right in the submission which I have set out just now.

To start with the pleadings did raise this ground of invalidity of the deed. In paragraph 7 of the plaint it was stated :

"The deed recites that the settlor gave possession on the date of the deed to the settlees which however is not true".

The 1st defendant whose statement was adopted by the 2nd defendant stated in paragraph 5 :

"The said properties were also placed in possession of the defendants 1 and 2 and they have been in exclusive and undisputed possession of the same from the date of the settlement deed. The said deed was duly accepted by these defendants and acted upon."

The same allegation was repeated at the end of paragraph 6. On the basis of these pleadings there is no doubt that the proper course for the trial Judge was to have framed a specific issue relating to the delivery of possession by the donor after the execution of the deed. Learned counsel for the appellants is also justified in drawing my attention to the facts that when the plaintiff's witnesses were examined and they examined three witnesses, the only point upon which their evidence was directed was in relation to issues 1 and 2 as framed, namely, undue influence and Marz-ul-Maut. When, however, the 1st defendant was examined, he gave evidence in chief-examination as regards the transfer of possession and he was cross-examined on these answers. When the matter was taken up for argument before the trial Judge, this point as regards delivery of possession is seen to have been stressed by learned counsel for the plaintiffs apparently without any objection or complaint by the other side on the score of their being taken by surprise. Again when the learned Subordinate Judge found against the donees on this point and when they filed an appeal to the District Judge there was no complaint by them that they were taken by surprise by the absence of any formal issue framed at the trial. The

contentions put forward by them in regard to this point were the same as had been urged at the trial, that is, on the merits of the plea. It was only when they filed a further appeal to this Court that any argument based upon the absence of formal issue and the prejudice suffered thereby was put forward. In the circumstances, I consider that this plea of surprise is an afterthought and that I should not accede to the submission of learned counsel for the appellants that I should allow the appeal and reject the point raised by the plaintiffs as regards this requirement of Muslim law not having been satisfied by the gift on which the appellants based their title.

Learned counsel for the appellants made two further alternative submissions: First, that there was a recital in the deed of gift Exhibit B-1 by the donor of having delivered possession of the properties gifted to the donees, that this was an admission binding upon those who claimed under the deceased. This admission he urged would no doubt not be conclusive proof of possession having been delivered but it raised a rebuttable presumption that the donor had accomplished what he stated he had, with the result that the burden of proof that the donor had not delivered possession would be on the plaintiffs and the 3rd defendant who would have to establish that, as a fact, possession had not been delivered and that it was not for the defendants to establish that the recital in the deed was true and represented the facts. The second was that even on the evidence on record the defendants had made out that there was delivery of possession effected by the donor simultaneously with or immediately after the execution of the deed of gift.

On the other hand, Mr. Jagadisa Ayyar, learned counsel for the respondents argued (1) that as the Courts below had concurrently found that the delivery of possession had not been effected by the donor as required by the Muslim law I would not be justified in interfering with the finding in second appeal; (2) that in the circumstances of this case and regard being had to the nature of the property, several items of which were in the possession of the tenants, the burden was properly cast upon the defendants to prove delivery of possession, (3) that the recital in the deed was only a piece of evidence and was not sufficient to shift the onus to those attacking the effectiveness of the deed and (4) lastly that in any event as both the parties were misled by the absence of a formal issue and by a correct understanding of the burden of proof in regard to delivery of possession I should send the case back for re-trial after framing the proper issue to be tried and that I should not act on the basis of the evidence on record which may not be sufficient to hold that possession had not been delivered if the onus was upon the plaintiffs to prove that fact.

In my judgment, learned counsel for the appellants is justified in his complaint that the Courts below have wrongly thrown the onus of proving that this requirement as to delivery of possession had been complied with on the contesting defendants. It is no doubt true that delivery of possession of gifted properties is an essential condition of the validity of the gift and its operative nature under the Muslim law and it would be for the donees to establish it. But the Courts below have failed to appreciate the evidentiary value of the declaration by the donor which constitutes an admission as against him and those claiming under him. In Exhibit B-1 the donor said:

> "I have by means of this document settled on you the immovable properties. . . . . which are described hereunder which belong to me absolutely and which are in my possession and enjoyment and *left them in your possession*. Both of you shall from this day onwards hold and enjoy in peace the gift properties with absolute right and with powers of alienation. . . . . You shall if you so desire enjoy the settlement property jointly in common or enjoy the same by dividing by metes and bounds."

The effect of a recital of this type by a donor was the subject of consideration in an early decision of the Privy Council reported in *Sheikh Muhammad Mumtaz Ahmed* v. *Zubaida Jan*[1]. One of the points in controversy in that case related to the validity of a deed of gift and one of the grounds upon which the operative character of the deed was challenged was that possession had not been delivered by the donor in pursuance of the deed. Sir Barnes Peacok who delivered the judgment of the Privy Council said:

1. (1889) L.R. 16 I. A. 205 : I.L.R. 11 All. 460 (P.C.).

"In the deed of gift she (the donor) declared (an admission by which Usman as her heir and all persons claiming through him were bound) that she had made the donee possessor of all the properties given by the deed; that she had abandoned all connection with them; and that the donee was to have complete control of every kind in respect thereof."

This is therefore authority for the position that a declaration by the donor of having parted with possession of the property was an admission and one which was binding upon those who claimed under him. This question was again before the Judicial Committee in *Mohammad Sadiq Alikhan* v. *Fakhr Jahan Begam*[1]. The opinion of the Council was delivered by Sir George Lowndes who said in dealing with the conditions necessary to be satisfied before a gift by a Muslim could be upheld:

"The second objection involves some consideration of the Mohamedan law. It is not disputed that a gift of immovable property must ordinarily be completed by a transfer of possession and there seems to be no difference on this point between Hanafi and Shia Law. The Chief Court thought it was clear that Fakhr Jahan had taken actual possession but it is pointed out that this was only after her husband's death. So long as Baquar Ali was alive she merely resided there with him and no change seems to have been made in the method of their joint occupation. But in the first place the deed contains the statement; 'I deliver possession of the gifted property to my said wife' and this as a declaration of fact must be regarded as binding on the heirs of the donor. (See *Sheik Muhammad Mumtaz* v. *Zubaida Jan*[2], In their opinion the declaration made by the husband, followed by the handing over of the deed, are amply sufficient to establish a transfer of possession".

These two decisions were cited to the Courts below but they held that their effect was somewhat modified and that the law as laid down by them was dependent upon the special circumstances of each of those cases, relying on a decision of the Bombay High Court in *Nurbai* v. *Abhram Muhmad*[3]. I am unable to concur in this view. The learned Judges of the Bombay High Court distinguished the observations of the Privy Council which I have extracted earlier on the specific ground that in the case before them the person who challenged the deed was not claiming under the donor, but under an independent title. But this apart, there was also the further fact that on the facts proved in the Bombay case those who impugned the gift had been able to establish that possession was not in fact transferred. In my judgment there are no such circumstances in the present case. The proper rule to apply here as regards the burden of proof would be to hold that the declaration by the donor of his having parted with possession was an admission binding upon the plaintiffs and the 3rd defendant which however they might by cogent evidence disprove but that in the absence of independent proof by them the presumption raised by the admission ought to suffice to support the deed.

Both the Courts below have based their decision against the appellants not having discharged the burden of proof thrown upon them to establish the essential condition of law to sustain the validity of the gift. The concurrent finding of both the Courts below merely goes to this length, namely, that the appellants had not proved that the gift was operative. In considering the question in this manner the Courts have committed an error and I cannot therefore accept that finding as binding on me.

The next question I have to consider is whether it is proper in the circumstances of this case to act on the basis of the evidence on record or whether I should send the case back for retrial after the parties had an opportunity of adducing the evidence on the real issue that arises in this part of the case. The facts that over 8 years have elapsed since the suit was filed is certainly a factor which I have to consider in deciding this point. I have however reached the conclusion that notwithstanding this delay I should yield to the request made by learned counsel for the respondents that the appeal should not be decided on the basis of the evidence already on record. In doing so I have taken into account the facts that owing to the absence of a specific issue on this point the attention of both the parties was not focussed upon the requirement as to delivery of possession. The plaintiffs and those impugning the deed had, under the law as laid down, to prove that the deed was inoperative be-

1. (1931) 62 M.L.J. 320 : L.R. 59 I.A. 1 : I.L.R. 6 Luck. 556 (P.C.).
2. (1889) L.R. 16 I.A. 205 : I.L.R. 11 All. 460 (P.C.).
3. A.I.R. 1939 Bom. 449.

case there had been no delivery of possession and I have already adverted to the fact that none of the witnesses on the plaintiff's side said anything about this point. It is for this reason primarily that I have considered it unfair that an inference should be drawn against the plaintiffs because they possibly misled themselves as to the law on the point. But now that this has been cleared, it is proper that they should be given an opportunity to prove what they have to prove if they have to succeed in this litigation.

The choice for me is as between remanding the entire proceedings under Order 41, rule 23, for a re-trial or calling for a finding on fresh evidence under Order 41, rule 25, Civil Procedure Code. I have, after full consideration of the propriety of each of these courses, come to the conclusion that I should call for a finding on fresh evidence under Order 41, rule 25, Civil Procedure Code and in doing so I have taken into account mainly the long delay that has elapsed since the institution of these proceedings.

I have upto now considered the only question which has been debated in the Courts below whether the gift was invalid by reason of the donor not having delivered possession of the gifted properties during his lifetime. Learned counsel for the respondents drew my attention to another point which had been raised in the plaint and which was contradicted by the defendant but had not figured in the issues framed, nor even in the discussion in the judgments of the Courts below. This was in relation to a plea that the gift was bad because of Musha. In paragraph 7 of the plaint it was stated : "The deed is of undivided shares which is invalid in law". This was answered by the defendants in paragraph 6 where they stated :

> "All the properties dealt with in the settlement deed are specific divided portions of properties and were in the enjoyment of the settlor till the date of the settlement and they were as per enjoyment delivered over to defendants 1 and 2."

I have already set out the issues and it would be seen that this objection to the gift on the ground of Musha did not figure in them ; nor was it the subject of discussion in either of the Courts below. This objection is based upon the description of some of the items, conveyed under Exhibit B-1 as if they were undivided shares belonging to the donor. There is nothing in the evidence of the plaintiffs' witnesses pointing to their reliance on this feature of the gift deed. Nor was there anything suggested during the cross-examination of the defence witnesses indicating such reliance. I have already pointed out that during the course of the argument in the two Courts this was not put forward as an objection to the deed. In these circumstances I am inclined to hold that this objection even if indicated in the pleadings was really not thought to have been put forward seriously and was in any event abandoned during the proceedings anterier to the hearing before me. I am not therefore inclined to include this as a point on which any further evidence should be permitted to be led.

Before concluding I must refer to the memorandum of cross-objections filed by the plaintiffs in relation to the residential house which formed one of the items of properties gifted under Exhibit B-1. Though the trial Court upheld the plaintiffs' case as regards this item also, the learned District Judge on appeal took into account the relationship between the donor and the donees as well as the fact that they were jointly residing in the premises and basing himself on the authorities including decisions of the Privy Council, held that there was no necessity for the donor to remove himself from the premises in order that the gift might be operative. Learned counsel for the plaintiffs-respondents could not persuade me that this portion of the judgment was wrong or that the proposition of law on which it was rested was erroneous. The decree dismissing the plaintiff's claim in relation to the house was therefore proper and the memorandum of cross-objections is dismissed with costs of defendants 1 and 2. The further proceedings in this appeal will therefore be confined to the dispute in relation to the other items of property covered by Exhibit B-1.

As I have already indicated it will not be possible to decide this appeal properly in relation to the items other than the residential house covered by the memorandum of cross-objections without a finding on the question as to whether the plaintiffs and those impugning the deed of gift Exhibit B-1 had proved that there had been no delivery of possession to satisfy the requirement of Muhammadan law. The learned Subordinate Judge will submit a finding on the point just now indicated after recording such further evidence as the parties might adduce in proof of their respective cases. The finding will be submitted to this Court within three months of the receipt of the records by the Trial Court. Time for objections 10 days. The second appeal will be posted for final disposal after the receipt of the finding.

P.R.N. ——— *Finding called for.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE SOMASUNDARAM.

The Public Prosecutor .. *Applicant**

v.

R. Karuppian .. *Respondent.*

Prevention of Food Adulteration Act (XXXVII of 1954), *sections* 16 (1) *and* 17 (1)—*Offence committed by a company—Person in charge of the company—Liability of.*

Section 17 (1) of the Prevention of Food Adulteration Act, 1954, clearly provides that where an offence under the Act is committed by a company, every person who is in charge or responsible for the conduct of the business of the company shall be deemed to be guilty of the offence, along with the company, and is liable to be proceeded against and punished. Of course it is open for such persons under the proviso to that section to show that the offence was committed without their knowledge, etc. In a prosecution against persons in charge of a company for an offence under the Act the prosecution should therefore establish that the offence was committed with the consent or connivance of the persons in charge of the company, or that it is attributable to any neglect on the part of such persons.

An Honorary Secretary of a Co-operative Society, who was merely checking the daily collections and was not in charge of the day-to-day sales, etc., cannot be said to be in charge of or responsible to the society for the conduct of its business and in the absence of evidence to show his connection with the offence charged he cannot be held to be liable.

Appeal under section 417 of the Code of Criminal Procedure, 1898, against the acquittal of the aforesaid respondent (accused) by the Sessions Judge of the West Tanjore Division at Tanjore in C.A. No. 290 of 1956 on his file (C.C. No 275 of 1956 on the file of the Court of the Sub-Divisional Magistrate, Tanjore).

The Public Prosecutor (*P. S. Kailasam*), for Appellant.

T. S. Kuppuswami Ayyar, for *K. S. Naidu* and *V. S. Gopalaraman*, for Respondent.

The Court delivered the following

JUDGMENT.—This is an appeal against the acquittal of the second appellant (accused 3) by the Sessions Judge of West Tanjore in C.A. No. 290 of 1956 on his file.

The Co-operative Milk Supply Society at Papanasam was prosecuted along with two other accused for adulteration of milk, an offence punishable under section 16(1) of Central Act XXXVII of 1954. There is no doubt about the fact that the milk sold was adulterated. This fact is not disputed even by the learned counsel for the respondent here. Accused 2 was the actual vendor of the milk and he was convicted by the trial Court and his conviction has been upheld by the Sessions Judge. The Co-operative Society represented by the Secretary was also convicted and the Secretary himself (accused 3) was convicted by the trial Court. On appeal the Sessions Judge confirmed the conviction of the Co-operative Society but acquitted accused 3, the Secretary, on the ground that he was in charge only as Secretary of accused 1 Society and not in his individual capacity. Very strangely before the lower appellate Court the Public Prosecutor conceded that the Co-operative Society and the Secretary cannot separately be convicted. The view taken by the learned Sessions Judge on the concession by the learned Public Prosecutor of the lower Court is not correct.

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* Criminal Appeal No. 98 of 1957. 19th September, 1957.

Section 17 (1) of the Act clearly says that where an offence under the Act has been committed by a company, every person who at the time the offence was committed was in charge of, and was responsible to the company for the conduct of, the business of the company, as well as the company, shall be deemed to be guilty of the offence and shall be liable to be proceeded against and punished accordingly. There is a proviso to this clause to the effect that the Secretary or the other person can prove that the offence was committed without his knowledge and that in spite of his exercising all due diligence, he could not prevent the commission of such offence. But under clause (2) of section 17 if the prosecution establishes that the offence had been committed with the consent or connivance of or that it is attributable to any neglect on the part of any Director, Manager, Secretary, or other officer of the company, such Director, Manager, Secretary or other officer shall also be deemed to be guilty of that offence and shall be liable to be proceeded against and punished accordingly. In this case it is contended by the learned advocate for the respondent that it is not quite clear under what part of section 17 the prosecution was launched against accused 3. If it is under clause (1), then the prosecution must have distinctly let in evidence as to who was responsible to the Society for the conduct of the business of the Society. Only if it is under clause (2), the prosecution will have to let in evidence about the consent or connivance or of the neglect on the part of the Secretary. The evidence that has been let in by the prosecution in this case only shows that accused 3 was the Secretary and he was in charge of the day-to-day working of the Society and that he used to answer questions put to him by the Inspector whenever he went there. The Secretary himself has given evidence in which he says that he does not go to office daily and that there is a paid clerk and that he goes into the Society whenever he goes to the bazaar street and checks and the amounts collected by the clerk and signs the daily accounts. The evidence therefore at the most disclosed that what the Sectetary was doing was checking the cash received by the clerk and checking the accounts rendered by the clerk. Apparently the day-to-day business of selling the milk was done by the clerk, because on his own showing the Secretary who was only a honorary Secretary was not going to the Society daily and the business was left in the hands of the clerk with a check over him by the Secretary. This would not make him a person who at the time the offence was committed was in charge and was responsible to the Society for the conduct of the business of the Society. The prosecution could have let in evidence when particularly it was prosecuting accused 3 under clause (1) that the Secretary is the person who was responsible to the Society for the conduct of the business of the Society. In terms of this section, the prosecution has not let in evidence and the evidence let in falls short of the strict standard of proof required for conviction under section 16(1). In this view the Secretary, accused 3, cannot be convicted. The acquittal is therefore confirmed but not for the reason given by the lower appellate Court. The appeal is therefore dismissed.

R.M. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE RAMASWAMI.

V. K. S. Mohamed Yassin Rowthar .. *Petitioner**

Madras Court-fees and Suits Valuation Act (*XIV of* 1955), *section* 12—*Right of defendant to raise objection as to Court-fee—Scope of.*

Section 12 of the Madras Court-fees and Suits Valuation Act no doubt gives a statutory right to a defendant in a suit to raise objections to the adequacy of court-fee paid by the plaintiff. But to decide the question of court-fees, still it is only the allegations in the plaint and the nature of the relief claimed that should be looked into, irrespective of the defence set up in the written statement. It is of course open to the Court to look into the substance of the plaint claim as distinguished from its form, and demand the court-fee on a proper valuation on *prima facie* grounds available at the preliminary stage.

Under the former Court-fees Act questions on the appropriate court-fee were decided by the Court before the plaint or appeal, etc., is taken on file. Under the New Act a tentative decision is

* C.R.P. No. 717 of 1957. 5th July, 1957.

taken with the provision to decide definitely the question of court-fees after notice to the defendant. But this does not mean that a defendant is entitled to have the whole suit or any particular issue of it adjudicated upon at a preliminary stage in the guise of an issue regarding the sufficiency of court-fee. The defendant is given the right to raise the question of court-fee not because he is interested in the collection of court-fee but because the question of valuation affects also the jurisdiction of the Court in some cases.

The scope of investigation or inquiry under section 12 is therefore limited to determining the nature of the suit and to see if there is any under-valuation. Under the pretext of deciding questions of court-fees there cannot be a trial of the suit.

Where the plaintiff seeks relief of partition on the basis of joint possession but the defendant denies joint possession, section 12 of the Court-fees Act does not enable the defendant to have this controversy decided as a preliminary issue in the guise of deciding the correctness of the court-fee paid.

Petition under section 115 of Act V of 1908 praying the High Court to revise the order of the District Court of East Tanjore at Nagapattinam, dated 28th March, 1957 and made in O.S. No. 13 of 1956.

T. S. Kuppuswami Aiyar and *V. Meenakshisundaram*, for Petitioner.

The Court delivered the following

JUDGMENT :—This is a revision sought to be preferred against the order made by the learned District Judge of East Tanjore in O.S. No. 13 of 1956.

The facts are:—The plaintiff V. K. S. Mohammad Noordin filed a suit for partition and separate possession of his half share in the suit joint family properties described in Schedules A to F of the plaint and to direct the defendant to render accounts for the rents and profits with regard to the plaintiff's half share and for costs. The defendant V. K. S. Mohamed Yassin Rowthar has raised the objection that the suit has been filed on the foot of joint possession, whereas in reality there has been no joint possession and therefore the relief of partition on the foot of joint possession cannot be asked for but that the suit should be one for recovery of possession for which *ad valorem* court-fee will have to be paid. In other words, even though the suit is filed on the footing of joint possession to be converted into separate possession, the defendant wants this very controversy to be adjudicated upon as a preliminary issue on the ground that he is entitled to ask for such an adjudication under section 12 of the new Madras Court-fees Act of 1955. The learned District Judge has rejected this contention of the defendant on the ground that it was conceded by both sides that on the allegations contained in the plaint, as they now stand, the court-fee paid is correct and in the guise of determining the computation of the court-fee, there cannot be a trial of a suit within a suit or a rehearsal of the same in such proceedings. This Revision is against that order to proceed with the trial of the suit.

The short point for determination is whether the newly enacted section 12 of the Court-fees Act of 1955 necessitates the course which the defendant in the lower Court wanted it to adopt.

Sub-sections (2) and (3) of section 12, as pointed out in the invaluable and up-to-date guide to the Law of Court-fees, Fourth Edition (1955) compiled by Messrs. K. Krishnamurthi and R. Mathrubutham (M.L.J. Publication) at page 10, give a new statutory right to defendant to raise objections to the adequacy of court-fee paid by the plaintiff. In fact even before this enactment, there was a widespread practice, especially in the mofussil Courts, on defendant raising such objection being heard on such objection, though there was no legal sanction for it under the old law as laid down by the decisions of the Madras and other High Courts. It was then the settled law that the allegations in the plaint were alone to be considered and not the statements made by the defendant in the written statement.

This has been set out in Basu's Court-fees Act (Seventh Edition) at pages 93-94, as follows :

"The valuation generally, is the valuation by the plaintiff; the plaint only is to be taken into consideration and not the statements by the defendant in the written statement".

The Court has got to look at and see in each particular case what is the nature of the relief claimed and, for that purpose it must look at the allegations that are contained in the plaint. *Bagala Sundari* v. *Prasanna*[1], *Manghammal* v. *Tolaram*[2], For the purposes of stamp duty the cause of action which is stated in the plaint, and that only must be looked at, *Areekastonath* v. *Kalleani*[3], *Mohendro* v. *Ashutosh*[4], *Rajabala* v. *Radhika*[5], *Zinnatunnessa* v. *Girindra*[6], *Tulsi Bibi* v. *Farrakh Bibi*[7]. The question as to what the proper court-fee ought to be on the plaint depends on the allegations in the plaint. *Tulsi Bibi* v. *Farrakh Bibi*[7], see also *Safdar* v. *Achcham*[8], *Nand Kishor* v. *Achambit*[9], *Suryanarayanacharyulu* v. *Narasimhaswami*[10], *Daroga* v. *Mohar*[11], *Kailash* v. *Gopi Nath*[12], *Ram Nain* v. *Ram Dhari*[13], *Durga* v. *Ambika*[14], *Ishwar Dayal* v. *Amba Prasad*[15]. Even where there is room for some suspicion that a plaint has been so drafted as to avoid inconvenient facts and make it appear that it is not necessary to pay a higher court-fee, such a suspicion will not justify the departure from the principle mentioned above, *Karia Nachi* v. *Allapichai*[16].

See also *Karuppanna* v. *Angammal*[17], where it has been held that for the purpose of ascertaining the court-fee payable, the Court must have regard to the allegations in the plaint. It is not material whether these have been denied or not in the written statement. See also *Sankaran* v. *Gopal*[18], *Venkata Ramani* v. *Narayanasami*[19], and *Deoki* v. *Ramsevak*[20]. The fact that the defendant sets up a different title cannot alter the nature of the plaintiff's claim[20]. If the facts are found to be as pleaded by the defendant, the proper course is to dismiss the suit and not to convert the suit into another of a different character[20]. The amount of court-fees leviable, is to be determined on the construction of the plaint alone, *Ishwari Prasad* v. *Rai Hari Prasad*[21], *Mst. Barakatunnissa* v. *Mst. Kaniza Fatma*[22], *Har Naryan Singh* v. *Darshan*[23], *Banku* v. *Chatur*[24], *Hasan Khan* v. *Ahmad Khan*[25]. (See discussion at page 60 of Krishnamurthi and Mathrubutham Guide to the Law of Court-fees at page 62 citing *Ramaswami Aiyangar* v. *Rangacharlar*[26], *Asha Ram* v. *Jagan Nath*[27], *Ganesh Gopal* v. *Moreswar Narayan*[28] and *Nemi Chand* v. *Edward Mills Co. Ltd.*[29].

But even then the Courts were entitled to look into all the materials available to determine the substance of the claim as distinguished from the form in which the reliefs have been cast and see that the plaintiff did not fix arbitrarily the value of the relief claimed by him or adopt a fictitious value or by making vague and indefinite statements of fact in the plaint. But this revision of the valuation was not undertaken by embarking into what would practically be a rehearsal of the suit or trying a suit within a suit[30] but on *prima facie* grounds available at that stage and with such aid as was indispensable like the appointment of a Commissioner. See

1. (1917) 21 C.W.N. 375.
2. (1912) 16 I.C. 773.
3. (1943) 1 M.L.J. 296.
4. (1893) I.L.R. 20 Cal. 762.
5. (1924) 40 C.L.J. 150.
6. (1903) I.L.R. 30 Cal. 788.
7. A.I.R. 1935 Cal. 273.
8. A.I.R. 1943 Oudh 456.
9. (1937) I.L.R. 16 Pat. 491.
10. (1939) 1 M.L.J. 268: I.L.R. (1939) Mad. 367 (S.B.).
11. I.L.R. (1938) All. 470.
12. I.L.R. (1937) All. 259.
13. 1943 A.L.W. 348.
14. (1937) I.L.R. 15 Luck. 76.
15. A.I.R. 1935 All. 667.
16. (1937) 1 M.L.J. 572.
17. (1926) 51 M.L.J. 67.
18. (1906) I.L.R. 30 Mad. 18.
19. 1925 M.W.N. 276.
20. (1939) 182 I.C. 178.
21. (1926) I.L.R. 6 Pat. 506.
22. (1926) I.L.R. 5 Pat. 631.
23. (1924) I.L.R. 3 Pat. 403.
24. A.I.R. 1924 Pat. 640.
25. A.I.R. 1935 Pesh. 30.
26. (1940) 1 M.L.J. 32 : I.L.R. (1940) Mad. 259 at 278 (F.B.).
27. (1934) I.L.R. 15 Lah. 531 (F.B.).
28. A.I.R. 1951 Bom. 352.
29. (1953) 1 M.L.J. 117 : 1952 S.C.J. 674 : 1953 S.C.R. 197 (S.C.).

30. This *via media* course is apparently what the learned authors Messrs. Krishnamurthi and Mathrubutham had in mind in drafting the footnote to page 148 which is a thoughtful one and deserves careful study, *viz.*, that the Court should be guided not only by the allegations in the valuation paragraph of the plaint made solely for the purpose of court-fee. It does not mean however that on the pretext of assessing the court-fee the suit itself should be disposed of prematurely. It is here namely in deciding the betwixt and between that judicial discretion comes into play as in the case of deciding whether suits should be allowed to be filed in the pauper form having due regard to the various grounds enumerated in Order 33, rule 5, Civil Procedure Code (Madras Amendment) and especially whether the plaint allegations show a cause of action.

Onkar Mal v. *Ram Sarup*[1]; See also *Subodh Gopal* v. *Iswar Sridhar Thakur Jiu*[2], *Thirupathaiah* v. *Mangapathi Rao*[3], B. V. Viswanatha Iyer—The Law of Court-Fees (Fourth Edn.), M.L.J., page 77; Satyamurthi Iyer—The Court Fees and the Suits Valuation Acts (Third Edn.), page 56 ; Obhrai—The Law Regulating Court-Fees and Jurisdiction (1934), section 55, page 71.

This did not mean that Courts were helpless to prevent the known proclivities to evade the payment of proper court-fee because even then when in the course of the trial it appeared that the intention of the plaintiff was to interpret his plaint in one way for purposes of court-fee and in another way during the trial, the Court was held justified in returning the plaint for amendment so that the plaintiff should be tied down to one specific case both for the purpose of court-fee and for trial. (Unreported decision in C.R.P. No. 137 of 1947 dated 13th January, 1948). (*See also* the exhaustive and instructive discussion in A.I.R. Commentraies. The Court-Fees Act, 1870 and the Suits Valuation Act, 1887, Second Edn., section 7 N.B. and especially at page 64 and foll.).

Sub-sections (2) and (3) of section 12 give now a new statutory right to the defendant to raise objections to the adequacy of court-fee paid by the plaintiff.

Under the old Act, it has been held that the question of court-fee should be decided by the Court at the inception before the plaint is taken on file, that it is incumbent upon the Court to apply its mind to the question before the plaint (or appeal) is admitted and decide the question finally, and that it is not necessary that notice should go to the Government or to the defendant for the purpose *Venkatasubba Rao* v. *Venkata Rao*[4]. Now under the new Act, specific provision is made for a tentative decision at the time of registration of plaint and for a definite decision after notice to defendant and after hearing both the parties: See section 12 (1) and (2). (Krishnamurthi and Mathrubutham's Guide to the Law of Court-fees in Madras (M.L.J.) Fourth Edn., page 241.). But this does not mean that he can challenge the plaintiff to have the whole suit adjudicated upon in the guise of an issue regarding the sufficiency of the court-fee paid. It has to be borne in mind that the defendants are not interested in the collection of proper court-fee and are interested only in the obstruction to the prosecution of the suit by such objections if possible. The question of court-fee is a matter primarily between the Government and the party liable to pay the court-fee, *Mahasay Ganesh Prasad Ray* v. *Narendra Nath Sen*[5]. But the defendants may, however, justifiably be interested in some cases where he is not sure of success, in contending that the plaintiff has overvalued his suit and paid excess court-fee and that in any event he should not be liable for such excess by way of costs. The question of court-fee may also affect the question of jurisdiction in which the defendants would be vitally interested and which would not arise in this case because the District Judge has got unlimited pecuniary jurisdiction. In other words, the reason behind the sub-section seems to be that a decision on the question of valuation may not only affect court-fee but also jurisdiction of Court in which the defendant is obviously interested. (*Vide* Krishnamurthi and Mathrubutham's Guide at page 10). The sub-sections have certainly not been enacted on account of any distrust in the alertness of the Court machinery, or in roving Court-fee Examiners or the Government Pleader to ensure that proper court-fees are collected.

The several ways in which the court-fee may be deficient on plaint can be grouped under two heads, *viz.*, the relief may be under-valued and the deficiency in Court fee may be the result of under-valuation, or the relief may be properly valued but the plaint may be written on paper insufficiently stamped. Under-valuation again may be of two kinds, the value of the property which is the subject of the suit may be under-estimated or the relief may be valued under a wrong provision of the Act, while according to the correct provision applicable to the case the value

1. A.I.R. 1954 All. 722 (F.B.).
2. A.I.R. 1949 Cal. 659.
3. (1948) 1 M.L. 269.
4. (1951) 1 M.L.J. 73 at 78 : I.L.R. (1951) Mad. 367.
5. A.I.R. 1953 S.C. 413: 17 Cut. L.T. 73 (S.C.).

may be higher. These objections which can be raised by a defendant will fall under three heads, *viz.*, that the plaint has been written on paper insufficiently stamped; or that the value of the property which is the subject of the suit has been under-estimated; or the relief has been valued under a wrong provision of the Court-fees Act. In practice the objections will naturally be confined to under-valuation of the subject of the suit and valuation under a wrong provision of the Act, since the office will naturally check the plaint and under the Civil Rules of Practice the Head Ministerial Officer of the Court has been made responsible for seeing that plaints are written on proper and sufficiently stamped paper.

In regard to under-valuation of the subject of the suit, the Court can derive all help it can from the materials made available by both parties to satisfy itself that there is no under-valuation. In fact even before the enactment of this new provision, it was settled law that in case of under-valuation it was improper for the Court to hold up the decision on the question of Court-fee until the end of the suit or incorporate an order in the decree which is perfectly a useless course. Once the Court found that the market-value of the property was different from that alleged in the plaint, the plaintiff was at once called upon to make up the proper Court-fee determined before the trial of the suit took place and on his failure to do so, the suit was being dismissed under the old section 10 (now section 12 (2) of the new Act), the Court taking the assistance of a Commissioner if need be: *Sis Ram* v. *Sohan Lal*[1].

On the determination of this question of valuation the Court if it found that its jurisdiction was exceeded, directed the return of the plaint for presentation to proper Court unless the plaintiff as he was entitled to do gave [illegible] portion of the claim so as to bring the suit within the jurisdiction of that Cour[illegible] presented the plaint in the same Court: *Kannuswami Pillai* v. *Jagathambal*[2], *Varada Pillai* v. *Thillai Govindaraja Pillai*[3], *Bethaswami Naicken* v. *Nagammal*[4], *Ramanna* v. *Amireddi*[5], *Chandrayya* v. *Seethanna*[6], *Nemi Chand* v. *The Edward Mills Co. Ltd.*[7], *Ramakrishna Naidu* v. *Janaki Ammal*[8].

In regard to the correct provision of the Act under which the relief should be valued, it practically resolves itself into a question, under which category of suits the plaint should fall. As regards the correct classification, there is no difference between the old procedure and the new procedure and the Court always took the help of the materials furnished by the defendant to correctly classify the suit before its disposal, since most often it had a vital bearing on the question of jurisdiction.

The net result of this analysis is that though the new sub-sections (2) and (3) of section 12 give a statutory right to the defendant to raise objections to the adequacy of the Court-fee paid by the plaintiff, in practice, so far as mofussil Courts are concerned, there has been no startling departure and in fact what was being done in practice has been placed on a statutory basis now. It follows that the field of investigation in regard to Court-fees is confined practically to the determination of two points, *viz.*, under-estimation of the subject of suit and the category under which it should fall for the purpose of Court-fee and cannot be larger than what it was before. In other words, under the pretext of proper computation of Court-fee there cannot be a trial of a suit within a suit and this stage of the proceeding cannot be made the rehearsal of the suit—a course fraught with grave complications to both sides including the real danger that the preliminary decision though it may not technically operate as *res judicata*. See *Narasimhulu Chetty* v. *China Ramayya Naidu*[9], *Sundaram Aiyar*, In re[10], *Nemi Chand* v. *The Edward Mills Co. Ltd.*[7], is bound to seriously prejudice the ultimate and final decision.

This Revision is dismissed.

R.M. ——— *Petition dismissed.*

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1. A.I.R. 1938 Lah. 311.
2. (1918) 35 M.L.J. 27 : I.L.R. 41 Mad. 701.
3. (1930) 59 M.L.J. 953.
4. (1930) 57 M.L.J. 899.
5. (1930) 61 M.L.J. 43.
6. (1940) 1 M.L.J. 590.
7. (1953) S.C.R. 197 : (1952) S.C.J. 674 : (1953) 1 M.L.J. 117 (S.C.).
8. (1954) 2 M.L.J. 232.
9. (1942) 1 M.L.J. 400.
10. (1943) 2 M.L.J. 106.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE SUBRAHMANYAM.

V. Lakshmanan .. *Petitioner**

v.

Sambandam Pillai .. *Respondent.*

Madras Cultivating Tenants Protection Act (*XXV of* 1955), *section* 3 (4) (*b*)—*Eviction on the ground of default or failure to deposit rent—Need for strict adherence to the wording of the statute—'Deposit' if equivalent to pay or tender.*

In administering special Acts like the Madras Cultivating Tenants Protection Act, 1955, it is necessary that the officers in charge should pay special attention to the language of the enactments In cases of petition for eviction of a cultivating tenant the Revenue Divisional Officer, if he consider it just and reasonable, is to direct the tenant to deposit the arrears of rent. The word 'deposit' is used advisedly by the Legislature to avoid further controversy which might arise if the order is to pay or tender the rent to the landlord, which tender the landlord might refuse and so on.

Hence where the Revenue Divisional Officer does not make an order for deposit of the arrears of rent, if any, by the tenant as required by section 3 (4) (*b*) of the Act but only makes an order that the tenant should pay the arrears to the landlord on or before a specified date, non-compliance with the order cannot entail eviction of the tenant.

Petitions under section 68 of Act XXV of 1955 as amended by Act XVI of 1956 praying the High Court to revise the order of the Presiding Officer, Revenue Court, Kumbakonam, dated 24th April, 1957 and 22nd May, 1957 and made in P. Nos. 66 and 67 of 1957.

Palaniswami for *Mohan Kumaramangalam* and *K. V. Sankaran* for Petitioner in both petitions.

T. S. Kuppuswami Ayyar for Respondent in both petitions.

The Court made the following

ORDER.—Purporting to act in the exercise of his discretion under section 3 (4) (*b*) of the Madras Cultivating Tenants Protection Act, 1955, the Revenue Divisional Officer passed an order on 24th April, 1957, which he thus concluded :

"I order that the counter-petitioner should pay the above arrears to Sambandam Pillai on or before 21st May, 1957, failing which he will be ordered to be evicted from the suit lands."

The petition for eviction was posted to 22nd May, 1957. On that day, the tenant appeared before the Revenue Divisional Officer and presented a petition stating that he had brought Rs. 595 being the price of the 70 kalams of paddy which he had been ordered to pay the landlord on or before 21st May, 1957. The tenant requested the Revenue Divisional Officer to direct the landlord to receive the money. With reference to that request the Revenue Divisional Officer passed the following order :

"As the counter-petitioner has failed to measure 70 kalams of paddy on or before 21st May, 1957, I have no other option except to evict the counter-petitioner. Accordingly, I order that the counter-petitioner should be evicted forthwith from the suit lands".

It is plain that the learned Revenue Divisional Officer purported to discharge the duty laid on him by the first sentence of section 3 (4) (*b*) of the Act, which says :

"If the cultivating tenant fails to deposit the sum as directed, the Revenue Divisional Officer shall pass an order for eviction".

It is unfortunate that the learned Revenue Divisional Officer failed to adhere in his order passed on 24th April, 1957, to the requirements of section 3 (4) (*b*) of the Act. That section requires the Revenue Divisional Officer, if he considers it just and reasonable to do so, to allow the tenant time for depositing the arrears of rent. When arrears of rent are deposited as directed, the tenant would be deemed to have paid the rent under sub-section (3) (*b*). Sub-section (3) (*b*) makes deposits to be made to avoid proceedings for eviction. The legislature deliberately used the word "deposit" in preference to expressions like "pay to the landlord" or

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* C.R.P. Nos. 707 and 708 of 1957. 21st October, 1957.

tender to the landlord " so as to avoid any further enquiries as to alleged tenders or payments. This case is an illustration of the wisdom of the Legislature, if I may say so, in using the word " deposit ". The Revenue Divisional Officer stated in his order, dated 24th April, 1957, that the tenant should pay the arrears to Sambandam Pillai on or before 21st May, 1957, failing which the tenant would be evicted. The Revenue Divisional Officer did not have adequate regard to the fact that the word " pay " includes tender and receipt. What was to happen if the tenant tendered the amount of paddy on 21st May, 1957 and the landlord refused to receive it? In that event, there would not be payment. Would it be just or proper to enforce the last part of the order—Revenue Divisional Officer's order—dated 24th April, 1957 and direct eviction? It is necessary particularly in administering special Acts that officers should pay special attention to the language used in the Acts. An order directing a deposit would not give rise to difficulties in implementation. There could be no controversy as to whether there was a deposit or not, while there might be controversy as to whether there was payment or tender. Section 3 (4) (*b*) makes it obligatory on the Revenue Divisional Officer to order eviction in the event only of failure to deposit. Not having made an order for deposit, the Revenue Divisional Officer was wrong in holding that he had no option except to pass an order for eviction. The order passed by the Revenue Divisional Officer on 22nd May, 1957, is set aside. He will restore the petitions to his file and if he considers it just and reasonable to do so make an order fixing a date for deposit of the price of the paddy payable as rent and then proceed further with the petitions. The proceedings should be expedited. The parties will bear their own costs in this Court.

R.M. ——— *Petitions allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE RAJAGOPALA AYYANGAR.

Mrs. S. Thomas .. *Petitioner**

v.

Collector of Madras (Land Acquisition Officer) .. *Respondent.*

Land Acquisition Act (I of 1874), sections 18 and 31—Acceptance of compensation without any protest—If amounts to an acceptance of the award and bars a reference under section 18 on a question of quantum of compensation.

The acceptance of an award under section 18 of the Land Acquisition Act and the consent referred to in section 31 (2) connote the same idea and is an inference drawn from the same facts. When section 31 speaks of a receipt without protest as debarring the owner from making further claims the same criterion must apply to the construction of section 18, and when admittedly the owner received the compensation awarded without protest it must be taken that he accepted the award and the Collector can in such circumstances refuse to refer a question of the quantum of compensation to the Court under section 18 of the Land Acquisition Act.

Petition under Article 226 of the Constitution of India, praying that in the circumstances stated therein, and in the affidavit filed therewith the High Court will be pleased to issue a writ of *mandamus* directing the Land Acquisition Officer and the Collector of Madras the Respondent herein to refer the petitioner's award No. 6 of 1957 and dated 25th March, 1957, to the City Civil Court at Madras under section 18 of the Land Acquisition Act.

K. M. Venkatavaradachari, for Petitioner.

Respondent not represented.

The Court made the following

ORDER.—The point that is raised in this petition is the legality and propriety of the order of the Collector refusing to refer a question of the quantum of compensation to the Court under section 18 of the Land Acquisition Act. The Collector declined the request for the reason that the petitioner had accepted the award. That the amount awarded as compensation by the acquiring officer was received by the petitioner and without any protest is not in dispute. But what is contended

* W.P. No. 747 of 1957. 28th October, 1957.

for the petitioner is that it is not the Collector who has to decide whether there has been acceptance of an award but the Civil Court on hearing the reference. It is stated that since the petitioner filed the application for the reference within the time limited by section 18, it must be taken that the petitioner had not accepted the award and that consequently the Collector had no jurisdiction to refuse to refer.

I do not agree. The acceptance of an award under section 18 and the consent referred to in section 31 (2) connote the same idea and is an inference drawn from the same fact. When section 31 speaks of a receipt without protest as debarring the owner from making further claims, the same criterion must apply to the construction of section 18, and when admittedly the owner—the petitioner here—received the compensation awarded without protest I must take it he accepted the award.

The order of the Collector was therefore not illegal and the petition fails and is dismissed.

K.S. ——— *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE GANAPATIA PILLAI.

Lakshmi Ammal .. *Petitioner**

v.

Thangaraju Padayachi and another .. *Respondents.*

Civil Procedure Code (V of 1908), Order 21, rule 91—Confirmation of sale held in execution—Pendency of an application by a third party offering a higher price—Sale confirmed without notice to such applicant—Validity.

Under the Code of Civil Procedure confirmation of a sale held in execution of a decree is the duty of the Court which it should perform *suo motu* even without any application by any party in that regard. The mere fact an application was made by the auction-purchaser, impleading a third party who had offered a higher price subsequent to the sale and had applied to the Court for directions as to resale of the property on his offer, and the sale was confirmed without notice to such party does not by itself vitiate the order of confirmation. The party who has subsequently offered a higher price is not entitled to any notice in the application for confirmation of sale by the earlier auction-purchaser.

Petition under section 115 of Act V of 1908 praying the High Court to revise the order of the Court of the Subordinate Judge of Kumbakonam, dated 3rd September, 1956 and made in I.A. No. 187 of 1956 in O.S. No. 10 of 1955.

The Court delivered the following

JUDGMENT.—The Civil Revision Petition is filed by an auction-purchaser, one Lakshmi Ammal, against the order of the Subordinate Judge of Kumbakonam in I.A. No. 187 of 1956 in O.S. No. 10 of 1955. To appreciate the question arising for determination in this petition, it is necessary to state the following facts.

O.S. No. 10 of 1955 was a partition suit between co-sharers and in that suit, after the preliminary decree was passed for partition, an advocate-receiver was appointed by the Court with power to sell some items of property concerned in the suit. Accordingly, that receiver sold on the 16th June, 1956, one item of property S. No. 5/2, 73 cents in extent, in public auction. The present petitioner, Lakshmi Ammal, was the highest bidder in the auction and her bid of Rs. 701 was accepted by the receiver and he reported to the Court the fact of the highest bid received at the auction, held by him. After the conclusion of the auction, one Thangaraju Padayachi, the respondent to this revision petition, filed an application before the receiver expressing his willingness to purchase the property for a sum of Rs. 801. The receiver forwarded this application also to the Court of the Subordinate Judge and asked for directions. When the report of the receiver was received in the Sub-Court, Thangaraju Padayachi filed I.A. No. 150 of 1956 in the Courts asking for the relief that the property should be directed to be re-sold

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* C.R.P. No. 1409 of 1956. 30th October, 1957.

on his offer to purchase for a higher price than the price offered by Lakshmi Ammal. Thereupon the learned Subordinate Judge directed Thangaraju to deposit Rs. 801 into Court to test his *bona fides* and accordingly this sum was deposited into Court. Nothing further was done in this application filed by Thangaraju. In the meanwhile, Lakshmi Ammal filed I.A. No. 172 of 1956 requesting the Subordinate Judge to confirm the sale in her favour. In due course the sale in favour of Lakshmi Ammal was confirmed by the order of the Subordinate Judge, dated 3rd August, 1956. In the application made by Lakshmi Ammal requesting confirmation of the sale in her favour, she had impleaded Thangaraju as a respondent. It is admitted that notice of this application was not given to Thangaraju before the learned Subordinate Judge passed orders on 3rd August confirming the sale. After the sale was confirmed, Thangaraju Padayachi filed I.A. No. 187 of 1956 before the learned Subordinate Judge requesting him to review the order confirming the sale in favour of Lakshmi Ammal and to direct a release of the property on the basis of the higher offer which he had already made. The learned Judge reviewed his previous order, dated 3rd August, 1956, set aside the confirmation of sale in favour of Lakshmi Ammal and directed a re-sale of the property. The validity and legality of this order is in question in this Civil Revision Petition.

Without going into the competence of a Court to review its own order confirming a sale, the learned counsel for the respondent, Mr. Desikan, properly concedes that if the prior order confirming the sale in favour of Lakshmi Ammal had been made with notice to his client, he would have no ground to urge against the legality of the first order of confirmation. No application by an auction-purchaser is necessary under the Civil Procedure Code to enable the Court to confirm the sale. Confirmation of the sale is a duty of the Court which it should *suo motu* perform without being prompted by any party. The mere fact that an application was made by Lakshmi Ammal and in that application Thangaraju Padayachi was erroneously made a party would not clothe Thangaraju Padayachi with any right which he would not otherwise have under the law. The Court was perfectly competent to confirm the sale in favour of Lakshmi Ammal without reference to Thangaraju Padayachi. Of course, the learned Subordinate Judge should have passed orders on the application filed by Lakshmi Ammal along with the application which Thangaraju filed for a re-sale, in which case this confusion would not have arisen. All interlocutory applications relating to the same sale, whether made by the auction-purchaser or any other party, should be posted to the same date, heard together and orders should be passed on any appropriate application in consonance with the decision which the Court arrives at. The failure to observe this elementary rule has led to this result, *viz.*, that the lower Court passed an order confirming the sale in favour of Lakshmi Ammal after having already passed an order on Thangaraju's application directing the re-sale of the property.

I hold that Thangaraju was not entitled to notice in the application for confirmation of sale which Lakshmi Ammal made in which proceeding the sale was confirmed by the Court. This order of confirmation cannot be reviewed on the ground mentioned by the lower Court, *viz.*, that Thangaraju had no notice of this proceeding. The conclusion of the learned Subordinate Judge in his order in I.A. No. 187 of 1956 that he could review the confirmation of sale already made in favour of Lakshmi Ammal on the score that in the application for confirmation of sale notice had not been taken to Thangaraju is, therefore, incorrect.

The Civil Revision Petition is allowed and the order passed in I.A. No. 187 of 1956 is hereby set aside. No costs.

R.M. *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE RAJAGOPALAN AND MR. JUSTICE RAJAGOPALA AYYANGAR.

N. K. C. Syed Mohamed Ravoother .. *Petitioner**

v.

Deputy Commercial Tax Officer, Tirukoilur .. *Respondent.*

Constitution of India (1950), *Article* 226—*Certiorari—Issue of writ—Another remedy open—Appealable order not appealed from—Effect of—Natural justice—Opportunity to show cause—Denial of—What amounts to—Assessment to sales-tax—Revision and re-assessment—Claim by assessee to exemption—Necessary material and evidence against assessee set out in notice and opportunity furnished to substantiate claim to exemption—Assessee failing to avail himself of same—Assessee's request for certified copies of documents containing facts known to him not granted—Order of assessment—If denial of opportunity—Right to issue of writ.*

Madras General Sales Tax Rules, (1939), *rule* 17 (1), (*as amended in* 1953)—*If retrospective—Assessment completed before amendment—Amendment giving extended period for re-assessment coming into force before expiry of original period of limitation—Re-assessment within extended period—Legality.*

Interpretation of Statutes—Retrospective operation—Statute of limitation—Rule.

Where another statutory remedy is available to the petitioner seeking a writ of *certiorari*, namely an appeal provided by the statute, but he fails to avail himself of that remedy, such failure under normal circumstances, would be sufficient for the High Court to decline to investigate the validity of the order impugned by the petitioner, preliminary to the grant of the discretionary relief of a writ of *certiorari* under Article 226 of the Constitution.

A mere refusal by the assessing authority under the Madras Sales-Tax Act to grant certified copies of certain documents cannot be held to amount to a denial of a real and effective opportunity to show cause against a proposed revision of an assessment and re-assessment under rule 17 (1) of the Madras General Sales-Tax Rules, when the turnover of the alleged sale was not in dispute and the only claim of the assessee was that the sale in question was exempt from sales tax, especially when all the evidence gathered by the assessing authority against the assessee was set out in the notice issued to the assessee. It was for the petitioner assessee to prove his claim, and when he did not avail himself of the opportunity afforded to him by the taxing authority more than once to establish his claim to exemption, and all the information necessary for him was available with himself, it must be held that it was more a case of the assessee manoeuvering for position to raise debatable points in other proceedings, and not a case of a denial of opportunity to the assessee, so as to entitle him to the issue of a writ of *certiorari* on the ground of the proceedings being contrary to natural justice.

Rules 17 (1) of the Madras General Sales Tax Rules, as amended on 11th June, 1953, is retrospective and applies to an assessment order made on 10th February, 1954, in respect of the year of assessment 1952-1953. The law of limitation being procedural law, its provisions operate retrospectively in that they apply to causes of action which arose before their enactment, though, if a right to sue or apply had become barred by the provisions of the law in force on the date of the coming into force of the later (or amended) enactment, such barred right is not revived by the application of the later enactment. *East Asiatic Co.* v. *State*, A.I.R. 1956 Mad. 158, distinguished and dissented from.

Ramanathan Chettiar v. *Kandappa Gounder*, (1950) 2 M.L.J. 624 and *Mohammad Hussain Nachiar* v. *Commissioner of Income-tax, Madras*, (1956) 2 M.L.J. 139, followed.

Petition under Article 226 of the Constitution of India, praying that in the circumstances stated therein, and in the affidavit filed therewith the High Court will be pleased to issue a writ of *certiorari* calling for the records relating to the assessment order of the Deputy Commercial Tax Officer, Tirukoilur, dated 20th March, 1956, and made in B-I/3470/52-53, and quash the same.

G. N. Chari, for Petitioner.

G. Ramanujam, for the Assistant Government Pleader (*K. Veeraswami*) on behalf of Respondent.

The Order of the Court was pronounced by

Rajagopalan, J.—This application for the issue of a writ of *certiorari*, preferred under Article 226 of the Constitution, arises out of proceedings taken by the Deputy Commercial Tax Officer, Tirukoilur, to assess the petitioner to tax under the Madras General Sales Tax Act (IX of 1939) for the assessment year 1952-53.

The petitioner was a dealer in grocery with his principal place of business at Ulundurpet within the jurisdiction of the Deputy Commercial Tax Officer, Tirukoilur, in South Arcot District. The petitioner was first assessed to tax on a turn-

* W.P. No. 450 of 1956. 3rd May, 1957.

over of Rs. 86,441-14-9 for the assessment year 1952-1953. The assessment was completed by the Deputy Commercial Tax Officer, Tirukoilur on 10th February, 1954. Proceedings were subsequently taken under rule 17 of the General Sales Tax Rules and on 20th March, 1956, the Deputy Commercial Tax Officer, Tirukoilur, revised the assessment for 1952-1953, to include in the assessable turnover of the petitioner a further sum of Rs. 56,279, which represented the price of chillies sold by the petitioner in Dindigul Taluk of Madurai district.

The events that transpired between the two assessments and which led up to the assessment on 20th March, 1956, have to be set out.

On 29th October, 1954, the petitioner applied to the Deputy Controller of Exports for a licence to export chillies. In that application the petitioner stated that in 1952-1953 he had sold chillies of the value of Rs. 56,279 at his place of business Nagayakottai in Dindigul taluk, and he claimed further that he had grown these chillies on his lands. The petitioner enclosed certificates from the village officers to prove his contention, that he had about 50 acres of land under his cultivation in the relevant period. That application of the petitioner was eventually rejected by the Deputy Controller on 12th April, 1955.

The Deputy Commercial Tax Officer, Dindigul, took proceedings to assess the petitioner to sales tax on the admitted sale turnover of the chillies in 1952-1953. The Deputy Commercial Tax Officer held that there was no proof that the chillies the petitioner admittedly sold in the relevant assessment year were grown by him on lands in which he had an interest. On September, 1955, the Deputy Commercial Tax Officer, Dindigul, completed the assessment and levied a tax of Rs. 879-5-9 on the turnover of Rs. 56,279. The petitioner preferred an appeal to the Commercial Tax Officer, Madurai, against that order of assessment. The petitioner did not disclose in the memorandum of appeal that he had his place of business at Ulundurpet and that he had already been assessed to tax for 1952-1953 by the Deputy Commercial Tax Officer, Tirukoilur. The petitioner averred in the memorandum of appeal that illness had prevented him from placing the relevant material before the Deputy Commercial Tax Officer, Dindigul, to prove that the petitioner had produced on his lands the chillies that he sold in 1952-1953. The petitioner furnished details of his lands that he held and he produced with the memorandum of appeal four lease deeds. The petitioner also pleaded that he had no opportunity of participating in the enquiry that the Deputy Commercial Tax Officer, Dindigul, claimed that he had conducted at Nagayakottai, to which that assessing authority referred in the order of assessment dated 22nd September, 1955.

Pending disposal of that appeal, when the Departmental authorities in Madurai realised that the petitioner was already an assessee within the jurisdiction of the Deputy Commercial Tax Officer, Tirukoilur, the latter was informed of the proceedings that had been taken by the Deputy Commercial Tax Officer, Dindigul. The Deputy Commercial Tax Officer, Tirukoilur, issued a notice to the petitioner on 1st January, 1956, to show cause why the turnover of the sales of chillies should not be included and the assessment for 1952-1953 revised. Eventually, after the enquiry in which the petitioner did not participate, the Deputy Commercial Tax Officer, Tirukoilur, ordered a revision of the assessment for 1952-1953. Rs. 56,279 was included and an additional tax of Rs. 879-5-9 was levied. That order of the Deputy Commercial Tax Officer, Tirukoilur, was dated 20th March, 1956, and it was the validity of that order the petitioner challenged in these proceedings.

The appeal preferred by the petitioner to the Commercial Tax Officer, Madurai, was allowed on 11th April, 1956, and the order of the Deputy Commercial Tax Officer of Dindigul, dated 22nd September, 1955, was set aside on the sole ground, that that officer had no jurisdiction to assess the petitioner who had his principal place of business at Ulundurpet. The petitioner claimed that he was not aware of the termination of the appeal when he presented his application on 18th April, 1956 to this Court under Article 226 of the Constitution and obtained a *rule nisi* on 24th April, 1956.

The learned counsel for the petitioner challenged the validity of the order dated March, 1956, mainly on two grounds; (1) the petitioner had been denied a real and effective opportunity to show cause against the revision of assessment and the inclusion of the disputed turnover of Rs. 56,279 and (2) the revision of assessment was barred by the relevant rule prescribing the period of limitation.

It should be noted at the outset that the petitioner did not avail himself of the statutory remedy open to him to appeal to the Commercial Tax Officer, South Arcot, against the order, dated 20th March, 1956. One of the grounds set out in the affidavit of the petitioner was that there were two orders of assessment, one by the Deputy Commercial Tax Officer, Dindigul, and the other by the Deputy Commercial Tax Officer, Tirukoilur, on the same turnover of Rs. 56,279. But even after the disposal of the appeal on 11th April, 1956, the petitioner did not appeal against the only order of assessment outstanding then, that of the Deputy Commercial Tax Officer, Tirukoilur, dated 20th March, 1956. Under normal circumstances that factor should have sufficed to decline to investigate the alleged invalidity of the impugned order preliminary to the grant of the discretionary relief of a writ of *certiorari* under Article 226 of the Constitution. We are not, however, resting our decision on that feature of the case. We are not convinced that there is any real substance in either of the contentions put forward on behalf of the petitioner.

What the petitioner urged in support of his claim, that he had been denied a real and effective opportunity by the Deputy Commercial Tax Officer, Tirukoilur, to show cause against the revision of assessment by the inclusion of the disputed turnover, was that the petitioner had not been furnished with copies of the relevant documents for which he applied to the Deputy Commercial Tax Officer, Tirukoilur.

It is true that even on 7th January, 1956, in response to the notice issued to him on 1st January, 1956, the petitioner wrote to the Deputy Commercial Tax Officer:

> "The petitioner requests that the Deputy Commercial Tax Officer may be pleased to grant certified copies of the records concerning the alleged transaction and showing how the said turnover was arrived at."

Subsequently on 29th January, 1956, the petitioner represented that he wanted copies of (1) the lease deeds that he himself had filed with the memorandum of appeal preferred to the Commercial Tax Officer, Madurai, (2) the certificate issued by the village officers as to the petitioner signed by the Revenue Inspector and Tahsildar, that the petitioner owned 50 acres and cultivated the same with chillies, and (3) the certificate issued by the Assistant Commercial Tax Officer, Dindigul, that the petitioner was an agriculturist producing chillies and therefore exempt from payment of sales tax for 1952-1953. It is equally true that copies of even these documents were never granted to the petitioner by the Deputy Commercial Tax Officer, Tirukoilur. We must confess that the basis of the refusal was not intelligible to us. Nonetheless the question remains, did the refusal of the copies amount to a denial of a real and effective opportunity to the petitioner to show cause against the proposed revision of assessment.

The controversy between the Department and the petitioner at that stage lay within a narrow compass. The petitioner admitted the sale of chillies. The turnover of these sales was not in dispute, as the petitioner's figures, disclosed in his application to the Deputy Controller for Exports, were accepted by the Department. The petitioner claimed that the turnover was exempt from taxation because he had produced the chillies on lands in which he had an interest either as owner or as lessee. Details of the lands he held he furnished in the memorandum of appeal he filed with the Commercial Tax Officer, Madurai. These records were all available, including the documents filed by the petitioner with his memorandum of appeal. The petitioner made no attempt to substantiate his claim, either with reference to these records or with reference to any other records in his possession including his books of account. He certainly knew wherefrom came the chillies which he admittedly sold in 1952-1953. The petitioner could have asked for an

opportunity to examine the original records with the Deputy Commercial Tax Officer, Tirukoilur. In his turn the Deputy Commercial Tax Officer could, independently of such a request, have offered inspection of the records to the petitioner. Neither was done. When we had been taken through the correspondence that passed between the Deputy Commercial Tax Officer, Tirukoilur, and the petitioner, we were not convinced that it was really a case of denial of opportunity to the petitioner assessee; it was more a case of the petitioner manouvering for position to raise debatable points in other proceedings. The petitioner had an opportunity. In fact more than one opportunity was furnished to him. All that was in evidence against him was set out in the further notice, dated 28th February, 1956, issued by the Deputy Commercial Tax Officer, Tirukoilur, though all the material set out in that notice had been gathered by the Deputy Commercial Tax Officer, Dindigul. The petitioner did not avail himself of the opportunity afforded by the Deputy Commercial Tax Officer, Tirukoilur, to establish the petitioner's claim, that the turnover in dispute was exempt from taxation. As the petitioner claimed an exemption it was for him to prove that he was entitled to it.

The plea of limitation has also little substance. Rule 17 (1) as it now stands provides for a three-year period of limitation, within which the assessing authority could complete the assessment of turnover which has escaped assessment. As rule 17 (1) stood first, it provided only for one year within which the escaped turnover could be assessed. The rule as amended on 7th February, 1948, provided for a two-year period. It was amended again on 11th June, 1953, when the period of limitation was enlarged to three years next succeeding that to which the tax related. The year of assessment with which we are concerned was 1952-1953. The escaped turnover was assessed by the order of the Deputy Commercial Tax Officer, Tirukoilur, on 20th March, 1956, that is, within three years of 31st March, 1953. The date of the original assessment, it should be remembered, was 10th February, 1954.

The contention of the learned counsel for the petitioner was that the period of limitation should be only two years, which was all that rule 17 (1) provided for as it stood on 31st March, 1953, at the close of the relevant year of assessment 1952-1953. Had rule 17 (1) not been amended, the assessment of escaped turnover would have had to be completed before 31st March, 1955. But before the expiry of that period, the rule prescribing the period of limitation was amended, giving the assessing authority three years within which to assess any turnover that had escaped assessment. It was the three-year period that could apply to the case of the petitioner. His contention, that he had acquired a vested right to the two-year period of limitation, is untenable.

In *Mohammad Hussain Nachiar* v. *Commissioner of Income-tax, Madras*[1], I pointed out that the principle to apply in such cases was the one laid down by another Division Bench of this Court in *Ramanathan Chettiar* v. *Kandappa Gounder*[2], where the learned Chief Justice observed:

> "It is well settled that the law of limitation being procedural law its provisions operate retrospectively in the sense that they apply to causes of action which arose before their enactment and that it is equally well established that if a right to sue had become barred by the provisions of the Act then in force on the date of coming into force of a later enactment, then such a barred right is not revived by the application of the new enactment."

In this case, before the right of the assessing authority was barred, the period of limitation prescribed by law was enlarged, and it was the amended law that determined the liability of the petitioner. As we pointed out earlier, before the two-year period of limitation expired on 31st March, 1955, the rule was amended on 11th June, 1953, providing a three-year period of limitation. The learned counsel for the petitioner referred to the decision of Ramaswami, J., in *East Asiatic Co.* v. *State*[3], a decision rendered on 5th May, 1954, that is before the decision in

1. (1956) 2 M.L.J. 139.
2. (1950) 2 M.L.J. 624.
3. A.I.R. 1956 Mad. 168.

Muhammad Hussain Nachiar v. *C.I. T., Madras*[1]. The attention of the learned Judge does not appear to have been drawn to the earlier decision in *Ramanathan Chettiar's case*[2], where as we pointed out, the learned Chief Justice referred to the principles of law as a well settled one. With all respect ot Ramaswami, J., we are unable to accept as correct the basis of his conclusion on this point :

"But the right which had accrued to the assessee, namely, that the escaped assessment of tax cannot be reopened beyond the period of one year cannot be described as a matter relating to procedure only and it was a matter which was more than one relating to procedure, that is to say, it touched a right in existence".

In *Ramanathan Chettiar's case*[2], the learned Chief Justice pointed that it was well settled that the law of limitation was procedural law. It should, however, be noted that in *East Asiatic Co* v. *State*[3], the relevant assessment years were 1945-1946 and 1946-1947; the notices issued to him under rule 17 were dated 24th February, 1950, and were received by the assessee on 4th March, 1950; the order of revision was dated 31st March, 1950.

Since neither of the contentions put forward by the learned counsel for the petitioner commends itself to us, we direct that the rule be discharged. There will, however, be no order as to costs.

P.R.N. *Petition dismissed.*
Rule discharged.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE RAJAGOPALA AYYANGAR.

K. M. Adam .. *Petitioner**

v.

The Income-tax Officer, 2nd Additional II Circle, Madras .. *Respondent.*

Income-tax Act (XI of 1922), section 46 (5-A)—Recovery of tax by notice to third parties who hold any amount due to the assessee—Bank allowing overdraft to assessee—Constituent—If a debtor of the assessee.

The provisions of section 46 (5-A) of the Income-tax Act is analogous to what is commonly called garnishee summons. The classes of persons on whom such notice could be served are two, *viz.*, (1) any person from whom money is due or may become due to the assessee and (2) any person who holds or may hold in future any money for or on account of the assessee. Where a bank only affords overdraft facilities to a customer-assessee and the customer is always in debit, there is no stage at which the bank is a debtor to such a customer nor does it hold any money of the customer on his account at any point of time. Hence the provisions of section 46 (5-A) of the Act cannot apply to those circumstances. If, however, at any stage the account of the customer is in credit, the section will come into operation. The mere fact that the Bank has agreed to allow overdraft to its customer who happens to be an assessee, up to a certain limit and the customer has not drawn to the full extent of the overdraft cannot entitle the department to ask the Bank to pay the difference between the limit of overdraft agreed to be allowed and the amount actually drawn by the customer.

Petition under Article 226 of the Constitution of India, praying that in the circumstances stated therein, and in the affidavit filed therewith the High Court will be pleased to issue a writ of prohibition restraining the respondent from taking any coercive steps for recovery of the tax assessment for the period 1950-1951 which is the subject-matter of the appeal pending before the Appellate Assistant Commissioner, Madras.

K. Srinivasan, R. M. Seshadri and *R. Narayanan*, for Petitioner.

C. S. Rama Rao Sahib, for Respondent.

The Court made the following

ORDER.—K. M. Adam, the petitioner, is a dealer in skins. He was assessed to income-tax for the years 1948-1949 to 1953-1954. The quantum of the tax levied in these assessments was disputed, by the petitioner, assessee, but that is not material for the present petition. What, however, is of relevance is that as a result of these assessments a sum of over Rs. 3,00,000 was found due from the petitioner as arrears of income-tax.

1. (1956) 2 M.L.J. 139.
2. (1950) 2 M.L.J. 624.
3. A.I.R. 1956 Mad. 168.

* W.P. No. 1006 of 1955. 14th October, 1957.

The petitioner had for the purpose of his business opened an overdraft account with the Indian Bank, Ltd., for which he had pledged with them, his stock of hides and skins. The limit set to the overdraft by the Bank was at Rs. 1,37,500. On the date relevant to the present petition the assessee had drawn on this account a sum of Rs. 1,31,301-2-1 and this sum was shown in the books of the Bank as debit to his account. While so, the Additional Income-tax Officer, Second Circle, Madras, who is the respondent in this petition, served a notice on 19th November, 1955, on the Indian Bank under section 46 (5-A) of the Indian Income-tax Act. In view of the points raised during argument it is necessary to set out the terms of this notice :—

"To

The Indian Bank (Head Office),
Madras 1.

A sum of Rs. 345,689-14-0 is due from K. M. Adam on account of Income-tax and/or penalty. I am to request you under section 46 (5-A) of the Income-tax Act, 1922, to pay me forthwith any amount due from you, to, or held by you for, or on account of, the said Mr. K. M. Adam of 46, Harris Road, Pudupet, Madras-2, up to the amount of arrears shown above, and also request you to pay any money which may subsequently become due from you to him or which you may subsequently hold for or on account of him up to the amount of arrears still remaining unpaid, forthwith, on the money becoming due or being held by you as aforesaid, as such payment is required to meet the amount due by the tax-payer in respect of arrears of income-tax and penalty. I am to say that any payment made by you in compliance with this notice is in law deemed to have been made under the authority of the tax-payer and my receipt will constitute a good and sufficient discharge of your liability to the person to the extent of the amount referred to in the receipt.

I am to observe that if you discharge any liability to the tax-payer after receipt of this notice, you will be personally liable to me as Income-tax Officer, II Addional Circle, Madras, to the extent of the liability discharged or to the extent of the liability of the tax-payer for tax and penalties whichever is less.

Further if you fail to make payment in pursuance of this notice to me as Income-tax Officer further proceedings may be taken by and before the Collector on the footing that this notice has the same effect as an attachment by the Collector in exercise of his powers under the proviso to sub-section (2) of section 46.

The necessary chalan for depositing the money to the credit of Government in the Reserve Bank of India will be supplied immediately on hearing from you.

A copy of this notice is being sent to Mr. K. M. Adam (tax-payer).

(Sd.)....................''

On receipt of this notice, a copy of which was also sent to the assessee, the Bank replied to the Income-tax Officer, on 23rd November, 1955, stating that there was no amount with them which was payable to Mr. Adam. They also set out the fact that the assessee has pledged with them his stock of hides and skins and had also executed a mortgage of certain of his properties described in the letter. They then stated the amount due to them, as also the limit set for the overdraft. A copy of this reply was sent to the assessee, with a note addressed to him reading ' Please do not operate on your account until you get the above order of the Income-tax Officer vacated '. The Income-tax Officer replied to this on the next day (24th November, 1955) when he said " With reference to the above, I have to state that as and when you make future payments the above notice comes into play." The result of this last communication was that the Bank refused to pay the petitioner any further sums on his overdraft account and this has led to the filing of the present writ petition under Article 226 of the Constitution.

The prayer in paragraph 8 of the supporting affidavit to the writ petition was that the records relating to the notice under section 46(5-A) issued by the respondent may be called for and quashed. Though in the petition there was also a prayer for the issue of a writ of prohibition restraining the Income-tax Officer from taking coercive steps for the recovery of the tax for the year 1950-1951 pending an appeal of the assessee before the Appellate Assistant Commissioner what was argued at the hearing of the petition was confined to the validity of the notice under section 46(5-A) and the action taken in pursuance thereof, particularly by the communication, dated 24th November, 1955.

Section 46 is the provision dealing with the mode of the recovery of the tax. Sub-section (5-A) enacts :—

"The Income-tax Officer may at any time or from time to time by notice in writing (a copy of which shall be forwarded to the assessee at his last address known to the Income-tax Officer) require any person from whom money is due or may become due to the assessee or any person who holds or may subsequently hold money for or on account of the assessee to pay to the Income-tax Officer either forthwith upon the money becoming due or being held at or within the time specified in the notice (not being before the money becomes due or is held) so much of the money as is sufficient to pay the amount due by the tax-payer in respect of arrears of income-tax and penalty or the whole of the money when it is equal to or less than that amount.

The Income-tax Officer may at any time or from time to time amend or revoke any such notice or extend the time for making any payment in pursuance of the notice.

Any person making any payment in compliance with a notice under this sub-section shall be deemed to have made the payment under the authority of the assessee and the receipt of the Income-tax Officer shall constitute good and sufficient discharge of the liability of such person to the assessee to the extent of the amount referred to in the receipt.

Any person discharging any liability to the assessee after receipt of the notice referred to in this sub-section shall be personally liable to the Income-tax Officer to the extent of the liability discharged or to the extent of the liability of the assessee for tax and penalties, whichever is less.

If the person to whom a notice under this sub-section is sent fails to make payment in pursuance thereof to the Income-tax Officer, further proceedings may be taken by and before the Collector on the footing that the Income-tax Officer's notice has the same effect as an attachment by the Collector in exercise of his powers under the proviso to sub-section (2) of section 46.

Where a person to whom a notice under this sub-section is sent objects to it on the ground that the sum demanded or any part thereof is not due to the assessee, or that he does not hold any money for or on account of the assessee then nothing contained in this section shall be deemed to require such person to pay any such sum or part thereof as the case may be to the Income-tax Officer.

It will be seen that this provision is analogous to an attachment of a debt or what is commonly termed a garnishee summons. The classes of persons to whom such notice could be served are two : (1) any person from whom money is due or may become due to the assessee and (2) any person who holds or may subsequently hold money for or on account of the assessee. The question which arises for consideration in the present case is, as to whether a bank which has afforded overdraft facilities to its customer, holds the amount, specified as that up to which the customer may draw is either 'a debtor' of the customer or holds that money on behalf of or on account of the customer.

I shall now proceed to consider whether the Bank in the present case stands in either of the two situations mentioned above. That moneys standing to the credit of a judgment-debtor in the current account of his in a bank is attachable is beyond dispute. This has been so held on the basis that the bank would be a debtor and could therefore be garnished. Similarly if the money of a customer is on a deposit account it would also be a case where the bank will be in the position of a debtor or as one who held money on behalf of the customer. It is unnecessary for the present case to complicate it by a consideration of the question which has been the subject of some debate as to the essentiality of a notice of demand before a sum due from a bank to a customer could be treated as garnishable debt. The sounder and the more generally accepted view on this point is that expressed in *Joachimson* v. *Swiss Bank Corporation*[1], that a garnishee order itself constitutes a sufficient notice to turn a bank into a debtor. That question apart, there must be a debt to be attached. Unless the Bank were a debtor there could be no attachment and an unutilised overdraft account does not render the bank a debtor in any sense and therefore, the bank is not a person from whom money is due to the customer. Nor does the Bank in such a case fall within the expression 'person from whom money may become due'. This refers to a case where there is a *debitum in presenti solvendum in futuro*, that is, where by reason of an antecedent contract between the garnishee and the judgment-debtor a 'debt' automatically emerges, where the maturing into a presently payable debt is not by reason of external compulsion but due to pre-existing facts which of their own motion bring a debt into existence at a prede-

1. L.R. (1921) 3 K.B. 110.

termined point of time. The proposition that a garnishee order does not accelerate the time for payment and that it does not alter any of the terms of the contract between the garnishee and the judgment-debtor relative to the accrual of a debt are too well established to need discussion.

Mr. Rama Rao Sahib, learned counsel for the department, did not contend, that the margin between what the assessee had drawn and the limit of the overdraft was a debt either due at the date of the attachment or which could become due in the manner, I have stated above. He rather rested his case on attempting to bring the present instance into the second limb of sub-section (5-A), namely, 'holds or may hold money for or on account of the assessee'. The argument under this head was somewhat on these lines. Immediately the customer drew a cheque on his overdraft account, which the Bank had by reason of the arrangement with the customer to honour, the money which it thus decides to pay to its customer, becomes at once the customer's money which between the time when the Bank makes up its mind to pay and the time of the actual payment it holds on the customer's account. I must confess that this approach is too metaphysical for me to comprehend. Just by way of illustration I will take the case of an ordinary lender to whom a judgment-debtor applies for a loan. The theory would, if applied to such an instance, result in some such position immediately the lender makes up his mind to lend and agrees to do so, *viz.*, that the lender holds the sum for or on account of the would-be borrower and so to speak becomes the debtor of the borrower and that when the money is actually paid that debt is discharged. But it would be seen that if the payment of the loan were thus a repayment of the borrower's money held by the lender, a loan would not result in any debt in favour of the lender which the borrower has to repay. I do not think it is worthwhile pursuing this theory any further. In my judgment when a Bank lends money on overdraft and the customer is always in debit there is no stage at which the bank is a debtor to its customer, nor any point of time at which it holds any money of his on his account. Section 46 (5-A) of the Act cannot be on any construction be intended as a credit freeze, with this feature superadded, that if there was any thawing, the resultant credit released became immediately payable to the department. Of course, if at any stage the account of the customer is in credit, section 46 (5-A) would come into play and the sum so standing to the credit of these cases might be directed to be paid over. The present is not such a case and this undoubted right of the department is not what is now sought to be asserted. What the impugned order of the Income-tax Officer directs is virtually that the Bank should pay over to the Department the difference between the limit of the overdraft allowed to the petitioner and the amount drawn by him up to the date of the notice under section 46(5-A). This in my judgment is not within the scope of the provision and the order understood in the light of the letter, dated 24th November, 1955, is consequently beyond the jurisdiction of the respondent. The notice is accordingly set aside but this will not prevent the department from proceeding to recover the arrears of tax in a manner authorised by the law. The rule is to this extent made absolute. There will be no order as to costs.

R.M *Notice set aside.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE RAJAGOPALA AYYANGAR.

N. Devasahayam .. *Petitioner**

v.

State of Madras, by Secretary, Home Department and others .. *Respondents.*

Constitution of India (1950), *Chapter VI, Part VI—Scope—G.O. integrating Civil and Criminal judicial offices—Validity—Consultation with the Public Service Commission—Articles* 310 *and* 311*—Scope—Tenure of offices under Government—G.O. varying and refixing seniority—Whether gives rise to a justiciable right.*

Sri C.D. Venkataraman was appointed temporarily to the post of a Presidency Magistrate under rule 9-A of the Madras Provincial and Subordinate Service Rules. The Madras Criminal Judicial Service was constituted by G.O. No. 760, dated 27th February, 1950. By G.O. No. 668, dated 22nd March, 1951, the posts of Sub-divisional Magistrates and Presidency Magistrates were integrated in the cadre of corresponding officers performing civil judicial functions. Sri C. D. Venkataraman was appointed on 8th February, 1952, as an Additional City Civil Court Judge—a post which was equivalent to that of a Subordinate Judge. By G.O. No.3114, dated 6th October, 1953, amendment of the relevant rules was carried out as already stated in G.O. No.668, dated 22nd March, 1951. G.O. No. 3114 embodied statutory rules framed in exercise of the powers conferred by Article 234 and Article 235 of the Constitution and the rules thus framed were to be in supersession of the existing rules and regulations on the subject. These rules were to come into force from 22nd March, 1951. G.O. No.3870, dated 26th December, 1953, enacted rules for the Madras Criminal Judicial Service in supersession of the previous rules. By G.O. M.S. No. 1020, dated 8th April, 1954, the Madras Criminal Judicial Services were integrated with the posts of Subordinate Judges in the Madras State Judicial Service. By G.O. No. 2707, dated 8th September, 1954, Sri C. D. Venkataraman was absorbed as a member of the Madras State Judicial Service by relaxing the relevant rules in his favour. G.O. No. 1463, dated 16th May, 1956, revised and refixed the rank and seniority assigned to Sri C. D. Venkataraman.

On a question as to the validity of the G.O. No. 668, dated 22nd March, 1951, integrating the civil and criminal functions and G.O. No. 1463, dated 16th May, 1956, revising and refixing the seniority :

Held : The definition of District Judges in Chapter VI, Part VI of the Constitution includes "Chief Presidency Magistrates, Additional Chief Presidency Magistrate, Sessions Judge, Additional Sessions Judge and Assistant Sessions Judge" so that at the level of the District Judge there is no distinction made between those discharging purely civil judicial functions and those administering the criminal law.

This would indicate that the provisions in this chapter conceived the two services as not having between them any irremovable barrier. The definition of 'judicial service' would also appear to support this last conclusion for it proceeds on the basis of a post of 'District Judge' being a 'civil judicial post' notwithstanding he as Sessions Judge administers criminal law for it refers to inferior posts as 'other civil judicial posts'. The District Judge in Article 236 (*b*) has to be understood in the sense as it appears in the definition in clause (*a*) of Article 236 and as therefore including, say, the Presidency Magistrates. Article 236, therefore, far from maintaining an inseparable division between the categories of officers who administer civil law and whose service was termed 'civil judicial' and those who administer criminal law and were called 'Magistrates' would appear to view the functions of the two categories of officers as if they would be comprised in one service. Any other construction would make Article 237 really unnecessary or meaningless. Under Article 309 rules could be framed for any service including of course the magisterial service and it contains no embargo on making a rule under that Article similiar to those contemplated by Articles 233 to 235. Therefore if the two services the civil judicial and the magisterial were to run on parallel lines, even after a notification under Article 237 the latter Article would perform no function. Even taking the use of the expression exclusively in the definition of judicial service in Article 236 (*a*) literally it does not preclude a Magistrate being appointed to a 'civil judicial post'. The reference in this definition is to 'posts' and not to cadres or categories. The provision for the appointment of a Presidency Magistrate as a Subordinate Judge is not in contravention of Chapter VI of Part VI of the Constitution.

The consultation with the Public Service Commission referred to in Article 234 is with reference to the framing of the rules in pursuance of which the appointments should be made. This conclusion is supported by the terms of Article 237 which refers to the "foregoing provisions of this chapter and any rules made thereunder". There is no other Article in the Chapter which refers to any rules made under it except Article 234. The reference to rules in Article 237 must therefore have been to the rules made under Article 234 which necessarily meant that the rules might be made under Article 234 and that these rules required the prior consultation of the Public Service Commission. This construction appears also to derive support from the terms of section 255 of the Government of India Act, 1935, which might be termed as predecessor of Article 234.

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*W. P. Nos. 487, 1131, 1353 and 1354 of 1956. 12th April, 1957.

G.O. No. 668, dated 22nd March, 1951, which purported by executive action to alter the existing rules in relation to the recruitment to the civil judicial service of the State could not have effect as a ule under Article 234, because, there was no prior consultation with the Public Service Commission.

But by G.O. No. 3114, dated 6th October, 1953, the relevant rules were in terms and in accordance with the law altered and these were framed after consultation with the Public Service Commission and were given effect to retrospectively from 22nd March, 1951. Thus the first appointment as Subordinate Judge was regularised and made valid.

Article 310 (1) emphasises the common law concept of service under Government being held at the pleasure of the Government. The express provision in the Constitution that is referred to in the opening words of the Article is to be found in Article 311. To the extent therefore there was non-observance of the requirements insisted on by Article 311 it gives rise to an enforceable right.

The right, however, that was infringed in the present case, the reduction in seniority, was an injury in relation to an office that was constitutionally declared to be held at the pleasure of the Governor. There is no basis for the contention that a legally enforceable right was infringed by the reduction in seniority.

The power to frame rules for the services no doubt is vested by the Constitution in the executive and in the Legislature under Article 309 but from this the conclusion cannot be legitimately drawn that the rules when framed became part of the Constitution so as to be treated as falling within the express exception in the opening words of Article 310 (1).

A 'reduction in rank' specified in Article 311 (2) is one which is inflicted as a punishment only.

R. Venkata Rao v. *Secretary of State for India in Council*, (1937) 1 M.L.J. 529 : L.R. 64 I.A. 55 : I.L.R. (1937) Mad. 532 (P.C.) and *Lall's Case*, (1945) 2 M.L.J. 270 : (1945) F.L.J. 129 : (1945) F.C.R 103 (F.C.) and on appeal to P.C. 1948 F.L.J. 23: (1948) 2 M.L.J. 55 : (1948) F.C.R. 44 (F.C.), referred.

Petition under Article 226 of the Constitution of India, praying that in the circumstances stated therein, and in the affidavit filed therewith the High Court will be pleased to issue a writ of *certiorari* calling for the records from the Secretary to Government of Madras, Home Department, relating to G.O. Ms. No. 1008, dated 31st March, 1956 and set aside the said Order, dated 31st March, 1956 and made therein in so far as it relates to the petitioner herein.

R. M. Seshadri, *R. Subramaniam* and *P. S. Baskyam*, for Petitioner in W. P. No. 487 of 1956 and *S. Mohan Kumaramangalam*, for Respondents 2 to 5.

K. V. Venkatasubramania Ayyar and *G. R. Jagadisan*, for Petitioner in W. P. No. 1131 of 1956 and *M. K. Nambiar*, *S. Mohan Kumaramangalam* and *K. K. Venugopal*, for Respondents 2 to 7.

M. K. Nambiar, *S. Mohan Kumaramangalam*, *K. V. Sankaran*, *K. K. Venugopal*, *S. Palaniswami* and *S. Sethurathnam*, for Petitioner in W. P. Nos. 1353 and 1354 of 1956 and *G. R. Jagadisan*, for 1st Respondent.

The Advocate-General (*V. K. Thiruvenkatachari*) and the Special Government Pleader (*V. V. Raghavan*) in W. P. Nos. 487, 1131, 1353 and 1354 of 1956, for the State, in all the Petitions.

The Court made the following

ORDER.—These petitions raise for consideration very difficult questions as to the construction of several orders of Government in relation to the constitution of the judicial service in this State subsequent to the coming into force of the Constitution and the validity of the orders issued by the State Government relating to the seniority among the classes of officers constituting that service.

The petitioner in W.P. No. 1131 of 1956 is a Judicial District Magistrate who challenges an order passed by the Government in May, 1956, altering to his prejudice the seniority accorded to him by orders of Government issued in 1951 and confirmed by them in 1954. W. P. Nos. 1353 and 1354 of 1956 have been filed by the officers who have been benefited by the order impugned in W.P. No. 1131 of 1956 and these seek to question the validity of the appointment of the petitioner and of another Judicial District Magistrate situated like him by the issue of writs of *quo warranto*.

Logically therefore the matters set out in W.P. Nos. 1353 of 1956 and 1354 of 1956 have to be considered first since if the challenge to the validity of the appointment of the petitioner in W.P. No. 1131 of 1956 succeeded, the earlier petition would become infructuous and would not need to be dealt with. In view of this, W.P. Nos. 1353 and 1354 of 1956 were heard first and I propose to follow this order in this judgment also. In doing so, I shall first set out in chronological order the several Government Orders which have been passed by Government which have a bearing on the points in controversy, the construction and validity of which were debated in these petitions. I might at once mention that most of these Government Orders and the other statutory provisions are relevant to the consideration of both the *certiorari* as well as the *quo warranto* petitions. As there is very little difference between the allegation in W.P. Nos. 1353 and 1354 of 1956 it would be sufficient if I set out the facts of the earlier numbered one.

There are 25 petitioners in W.P. No. 1353 of 1956 and all of them are members of the Madras State Judicial Service who were originally recruited as District Munsifs in the Madras Subordinate Civil Judicial Service. The respondents to this petition are Sri C. D. Venkataraman, District Magistrate (Judicial), Kanyakumari District and the State of Madras. The prayer in the petition is that the Court might issue a writ in the nature of *quo warranto* calling upon the 1st respondent (Sri C.D. Venkataraman)

> "to show cause by what authority he claimed to hold, enjoy and perform the duties, rights and privileges of a member of the State Judicial Service and in particular of his office of the District Magistrate (Judicial) in the Madras State Judicial Service".

I do not consider it necessary to set out the matters on the basis of which this relief is asked for as it would be convenient to deal with the arguments urged on behalf of the petitioners at the hearing by their learned counsel. I shall therefore proceed to set out the necessary facts detailing at the same time the statutory provisions under which the Government proceeded from time to time indicating the contentions raised by the parties in relation to these several Government Orders.

Sri C. D. Venkataraman was an advocate of this Court and was practising in Madras. While so, he was appointed as Chief Assistant Crown Prosecutor at Madras. Thereafter he was appointed temporarily to the post of a Presidency Magistrate in the city on 18th June, 1946. Till that date, Presidency Magistrates were being appointed only from Deputy Collectors and the post of a Presidency Magistrate formed part of the Madras Civil Service (Executive Branch). Sri C. D. Venkataraman was appointed as a Presidency Magistrate under rule 9-A of the Madras Provincial and Subordinate Service Rules which read:

> "Where it is necessary in the public interest owing to an emergency which has arisen to fill immediately a vacancy in a post borne on the cadre of a service, class or category and there would be undue delay in making such appointment in accordance with these rules and the special rules the appointing authority may appoint a person, otherwise than in accordance with the said rules, temporarily, until a person is appointed in accordance with the said rules".

These temporary appointments were subject to the provisions of rule 9-A and in particular to sub-rule (2) which provided:

> "A person. . . . shall not be regarded as a member of the service in which the post to which he is appointed is included and shall not be entitled by reason only of such appointment to any preferential claim to any other appointment in that or any other service."

The order of appointment of Sri C. D. Venkataraman recited that he had been appointed as a Presidency Magistrate until a Deputy Collector became available.

Possibly this might be the convenient stage, at which a reference might be made to the provisions contained in the Constitution itself in relation to these matters. The general provision in regard to the services under the Union and the States is to be found in Part XIV of the Constitution and in particular it would be necessary to refer to Articles 309 and 313.

> "309. Subject to the provisions of this Constitution, Acts of the appropriate legislature may regulate the recruitment, and conditions of service of persons appointed, to public services and posts in connection with the affairs of the Union or of any State.

Provided that it shall be competent for the President or such person as he may direct in the case of services and posts in connection with the affairs of the Union, and for the Governor or Rajpramukh of a State or such person as he may direct in the case of services and posts in connection with the affairs of the State, to make rules regulating the recruitment, and the conditions of service of persons appointed, to such services and posts until provision in that behalf is made by or under an Act of the appropriate Legislature under this Article, and any rules so made shall have effect subject to the provisions of any such Act.

313. Until other provision is made in this behalf under this Constitution, all the laws in force immediately before the commencement of this Constitution and applicable to any public service or any post which continues to exist after the commencement of this Constitution, as an all-India Service or as service or post under the Union or a State shall continue in force so far as consistent with the provisions of this Constitution."

These are the general provisions applicable to every service, but as regards the judiciary there were special articles in the Constitution contained in Chapter VI of Part VI with the result that Articles 309 and 313 have to be read along with these other provisions. Part VI contained the provisions in relation to the States in Part A and Chapter VI dealt with Subordinate Courts in these States while Chapter V laid down the constitutional provisions as regards High Courts in the several Part A States. Chapter VI is a very short one and consists of just five articles and as all these have been referred to and different interpretations sought to be placed upon them they might conveniently be set out here:

233 (1). Appointments of persons to be, and the posting and promotion of, District Judges in any State shall be made by the Governor of the State in consultation with the High Court exercising jurisdiction in relation to such State.

(2) A person not already in the service of the Union or of the State shall only be eligible to be appointed a District Judge if he has been for not less than seven years an advocate or a pleader and is recommended by the High Court for appointment.

234. Appointments of persons other than District Judges to the judicial service of a State shall be made by the Governor of the State in accordance with rules made by him in that behalf after consultation with the State Public Service Commission and with the High Court exercising jurisdiction in relation to such State.

235. The control over District Courts and Courts subordinate thereto including the posting and promotion of, and the grant of leave to, persons belonging to the judicial service of a State and holding any post inferior to the post of District Judge shall be vested in the High Court, but nothing in this article shall be construed as taking away from any such person any right of appeal which he may have under the law regulating the conditions of his service or as authorising the High Court to deal with him otherwise than in accordance with the conditions of his service prescribed under such law.

236. In this Chapter—

(a) the expression "District Judge" includes Judge of a City Civil Court, Additional District Judge, Joint District Judge, Assistant District Judge, Chief Judge of a Small Cause Courts, Chief Presidency Magistrate, Additional Chief Presidency Magistrate, Sessions Judge, Additional Sessions Judge and Assistant Sessions Judge;

(b) the expression "judicial service" means a service consisting exclusively of persons intended to fill the post of District Judge and other civil judicial posts inferior to the post of District Judge.

237. The Governor may by public notification direct that the foregoing provisions of this Chapter and any rules made thereunder shall with effect from such date as may be fixed by him in that behalf apply in relation to any class or classes of magistrates in the State as they apply in relation to persons appointed to the judicial service of the State subject to such exceptions and modifications as may be specified in the notification."

I shall take up the construction of these articles after completing the narrative of the several Government orders which were passed in relation to the judicial service in the State.

Even prior to Independence, the separation of the Executive from the Judiciary was a reform which had been in the plank of and urged by all the progressive parties in India including of course the Congress. At that date, at higher levels the Executive was manned by I.C.S. Officers who also exercised magisterial powers as District Magistrates in the case of Collectors, of First Class Magistrates in the case of officers below the rank of Collectors. The members of the Indian Civil Service were after a period of judicial training appointed to the posts of District Judges and the rules reserved a portion of these posts for members of that service. With the Independence Act, recruitment to the I.C.S. was stopped and its place taken by a new service the Indian Administrative Service. A decision was however taken by

the Government of India that I.A.S. Officers would be appointed to executive posts merely and not to the higher judicial posts like District Judges. It therefore became necessary to form a Provincial Higher Judicial Service in each State to comprise District and Sessions Judges and others included in the definition of District Judges under the Government of India Act, 1935, to be recruited at State levels and completely amenable to State administrative control in contrast to the reserve posts held by officers of the Secretary of State services who were under the ultimate control of the Governor-General and of the Secretary of State.

When this was decided on it also became necessary to provide a feeder service from which this category of higher judicial officers could be recruited. Direct recruitment could, both on grounds of administrative convenience as well as on other equitable grounds, be only to a fraction of these offices and the rest had to be appointed from a pool of officers, who having had prior judicial experience could be promoted to fill these offices. This necessity led to the formation of the Provincial Judicial Service for serving as a feeder service for promotion to the posts of District Judges. The result therefore was that judicial officers below the category of District Judges came to be manned by officers of gazetted rank performing the civil judicial and criminal judicial functions who were constituted into a single cadre to be called the Provincial Judicial Service which was to serve as a feeder for the Provincial Higher Judicial Service. The idea was that the Subordinate Judges would gain experience in the administration of criminal law by being District Magistrates for a term when they could more efficiently function as District and Sessions Judges than if they were straightaway promoted as District Judges from Subordinate Judges.

The details of the Constitution of these services as well as the qualifications that ought to be possessed by the members of the two services namely the Higher Provincial Judicial Service and the Subordinate Judicial Service which were to be an integrated and unified service consisting of both civil judicial and criminal judicial officers were all settled after consultation with the High Court. The first formal announcement of the constitution of these two services was by G.O. No. 760, dated 27th February, 1950. The preamble to this Government Order recited :

"Consequent on the introduction of the scheme of Separation of the Judiciary from the Executive in certain districts and the decision of Government to extend the scheme to the remaining districts in due course, Government have decided to constitute a separate Provincial Service for the District Magistrates under the Scheme of Separation. The service will be called the Madras Criminal Judicial Service. The rules relating to this service are appended to this order.

2. Government consider that it is unnecessary to consult the Madras Public Service Commission in regard to appointments to the posts of District Magistrates as these posts are to be filled entirely by promotion from the category of Subordinate Judges in the Madras Subordinate Civil Judicial Service in consultation with the High Court. The necessary regulation excluding these posts from the purview of the Commission will be issued in the Public (Services) Department."

This contained an appendix which carried a notification of rules made under the proviso to Article 309 of the Constitution in regard to the Madras Criminal Judicial Service. Under these rules, which were stated to have come into force as and from 2nd October, 1949, the Madras Criminal Judicial Service was to consist of District Magistrates and they would be appointed by the State Government in consultation with the High Court by transfer from the category of Subordinate Judges in the Madras Subordinate Civil Judicial Service. A further provision in the rules directed that postings and transfers of District Magistrates were to be made by the State Government in consultation with the High Court.

The Madras Criminal Judicial Service having thus been constituted and this being fed by promotions from the category of Subordinate Judges, the State Government proceeded to effectuate the integration from the other end, namely from the point of view of the civil judiciary. This was by G.O. No. 668, dated 22nd March, 1951. The preamble to this Government Order recited :

"The Government have had under consideration the constitution of a separate State Higher Judicial Service for the posts of District Judges and certain other isolated posts. . . . . . The Government have also had under consideration the question of giving effect to the decision taken in

connection with the implementation of the Scheme of Separation of the Judiciary from the Executive in regard to the integration of Civil Judicial and Criminal Judicial Officers below the rank of District Judges. According to these decisions, barring the District Magistrates under the Scheme of Separation for whom a separate State service has already been constituted (this was a reference to G.O. No. 760, dated 27th February, 1950 mentioned earlier), the posts of Sub-Divisional Magistrates and Presidency Magistrates had to be integrated in the cadre of corresponding officers performing civil judicial functions."

It then went on :

"After a careful consideration of all the relevant aspects of the matter and of the recommendations of the Honourable Judges of the High Court on the various questions, Government are pleased to issue the following orders on the points at issue :

"I. *The Madras State Higher Judicial Service* :

(i) This service will consist of the following officers:—

1. District Judges Grade I.
2. District Judges Grade II.
3. Chief Judge, Court of Small Causes, Madras.
4. Judges, City Civil Court, Madras.
5. Chief Presidency Magistrate, Madras.

II. *The Madras State Judicial Service*:

(i) The posts of District Munsifs, Sub-Divisional Magistrates, Presidency Magistrates and Subordinate Judges will be constituted into a separate service called the Madras State Judicial Service with the scale of pay. Of these, the posts of Subordinate Judges will be filled up by senior officers in the category of District Munsifs, Sub-Divisional Magistrates on grounds of seniority and merit.

(iv) With the integration of the posts of Presidency Magistrates in the State Judicial Service, the cadre strength of the Madras Civil Service (Executive Branch) will be reduced correspondingly.

(v) The existing incumbents in the posts of Presidency Magistrates will be regularised as members of the Madras State Judicial Service and will be given rank in the seniority list in relation to the pay they are actually drawing on the date of issue of these orders. They will however retain their present relative seniority among themselves.

3. Separate orders will issue in Public (Special) and Home Departments in regard to the issue of or amendment to the relevant rules.

The Government proceeded on the basis that by this order they had constituted the two services, namely, the Madras State Higher Judicial Service and the Madras State Judicial Service into one and had integrated the civil judicial officers and the Magistrates into a single unified service from which there could be promotions from one post to another post on the basis of seniority and merit.

The Madras Public Service Commission however appeared to have questioned the constitutional validity of the provisions in this Government Order, dated 22nd March, 1951, but the Government disregarded these objections and proceeded to give effect to their orders. The same objections have been urged before me questioning the legality of what is termed the integration of the services but to this I shall address myself after narrating the subsequent orders whose construction and validity were also the subject of argument in these petitions.

Sri C. D. Venkataraman was appointed on 8th February, 1952, as an Additional City Civil Court Judge—a post which was equivalent to that of a Subordinate Judge, in the Madras State Judicial Service and in the Quarterly Civil List of April, 1952, his name appeared as a Subordinate Judge. Immediately thereafter Sri Tirumalpad the first petitioner in W.P. No. 1353 of 1956 appealed to the Government protesting against the contents of the Government Order and the appointment of Sri Venkataraman who was as a Subordinate Judge assigned a rank above Sri Tirumalpad. This appeal was however rejected by the Government by its order, dated July, 1952.

It would have been noticed that the G.O. No. 668, dated 22nd March, 1951, had in paragraph 3 stated that orders would issue as regards the amendment of the relevant rules. This was carried out by G.O. No. 3114, dated 6th October, 1953. The notification embodied statutory rules framed in exercice of the powers conferred by Articles 234 and 235 of the Constitution and the rules thus framed were to be in supersession of the existing rules and regulations on the subject. The

rules were named the Madras State Judicial Service Rules and the rules were to come into force on 22nd March, 1951, which it will be noticed was the date on which G.O. No. 668 was passed. The provision as regards the Constitution of the service was in rule 3 the material portion of which read :

(i) The service shall consist of the following categories of officers, namely Category 1—Subordinate Judges; Category 2—District Munsifs.

(ii) Presidency Magistrates shall be construed as belonging to category 1 or category 2, as the case may be, to which they would belong but for their appointment as Presidency Magistrates.

The Presidency Magistrates referred to in rule (ii) were obviously the Presidency Magistrates appointed after the rules came into force. Under rule 4 the District Munsifs were to be recruited from, *inter alia*, the Sub-Magistrates and Additional First Class Magistrates in the Madras Subordinate Magisterial Service and the posts of Subordinate Judges were to be filled by promotion from District Munsifs. This was followed up by further special rules for the Madras Criminal Judicial Service—G.O. Ms. No. 3870, Home, dated 26th December, 1953, in supersession of the previous rules. The rules thus framed were however identical with those which were brought in by G.O. No. 760, dated 27th February, 1950, except in regard to the recital in the preamble that the rules were framed in exercise of the powers conferred by Articles 234 and 235 of the Constitution instead of being attributed to the powers conferred by the Proviso to Article 309 as had been stated in the Government Order of February, 1950. Only the new rules were to have operation as and from 22nd March, 1951.

Integration thus having been achieved to this extent the Government took the matter a stage further by G.O. Ms. No. 1020, dated 8th April, 1954, under which the posts of District Magistrates which under the G.Os. Nos. 760, dated 27th February, 1950 and 3870, dated 26th December, 1953, formed a separate cadre to be known as the Madras Criminal Judicial Service were integrated with the posts of Subordinate Judges in the Madras State Judicial Service. This order after referring to the Government Orders of February, 1950, and the correspondence with the Public Service Commission stated :

"The Government accept the recommendation of the High Court that the posts of District Magistrates which now form a separate cadre on the scale of. . . . should be integrated with and carry the same pay as posts of Subordinate Judges in Category 1 of the Madras State Judicial Service and direct that the integration be carried out with immediate effect.

2. Consequential amendments to the Madras State Higher Judicial Service Rules and the Madras State Judicial Service Rules will issue in due course."

The necessary amendments to these rules were issued subsequently which carried out this order.

After the G.O. No. 1020 of 1954, the Government took up for consideration the question of the officers who had been appointed temporarily as Presidency Magistrates who numbered five and who were recruited under the same conditions of service and similar circumstances as Sri C. D. Venkataraman and passed orders in September, 1954, assigning to these officers the rank and seniority which they should occupy in the State Judicial Civil Service. This was done by Government after consultation with the High Court and the Public Service Commission and the final orders on this matter are to be found in G.O. No. 2707, dated 8th September, 1954. The Government stated in this order :

"The Government have had under consideration the question of regularising the services of the following five officers who were appointed temporarily as Presidency Magistrates and who have been promoted subsequently as Sub-Judges temporarily by the High Court. They have decided in consultation with the High Court and the Madras Public Service Commission that the five officers should be absorbed as members of the Madras State Judicial Service by relaxing the relevant rules in their favour."

The power to relax was stated in paragraph 2 of this order as traceable to G.O. No. 400, dated 26th January, 1950 and the relaxation was said to have been effected by the Governor with the concurrence of the Madras Public Service Commission. It may also be mentioned that before this concurrence of the Public

Service Commission was obtained these Presidency Magistrates and Subordinate Judges were interviewed by the Commission and the Commission expressed satisfaction about their suitability for appointment as Subordinate Judges. By reason of this relaxation of the relevant rules, the State Government took power to appoint these five individuals to the State Judicial Service, that is, as permanent Subordinate Judges. As regards their rank and seniority they were to have these as had been assigned to them by the High Court. This last qualification meant that they would have a seniority above Sri Damodara Rao and Sri Tirumalpad, petitioners 2 and 1 respectively in W.P. No. 1353 of 1956 and necessarily over the other petitioners. The propriety of this assignment of rank and seniority to Sri C. D. Venkataraman and four others (of whom these petitions are concerned only with Sri K. Rajagopalan, the other three having either retired or being about to retire) was the subject-matter of memorials and representations by other officers of the State Judicial Service who having been recruited as District Munsifs had also been promoted to act as Subordinate Judges before these Magistrates started functioning as Subordinate Judges. These representations were considered by Government and they passed an order on 16th May, 1956, G.O. Ms. No. 1463 and directed that the rank and seniority assigned to these officers should be revised and refixed on the basis of the dates of their appointment as Subordinate Judges in 1952. This re-fixing of seniority has resulted in Sri C. D. Venkataraman being assigned a rank much lower than what he had under the Government Order of 8th September, 1954, and it is the validity of the later Government Order of 1956 altering the rank and seniority of Sri C. D. Venkataraman that forms the subject-matter of W.P. No. 1131 of 1956, praying for the issue of a writ of *certiorari*. I have only to add that the High Court has given effect to the Government Order of May, 1956, by revising the seniority of these officers on the basis indicated in the Government Order impugned in W.P. No. 1131 of 1956.

I shall now proceed to consider first the points that arise in the *quo warranto* petitions. Mr. Nambiar learned counsel for the petitioners urged that (1) the appointment of Sri C. D. Venkataraman and Sri K. Rajagopalan as Subordinate Judges was *ultra vires* of the Government the grounds for this being stated as (*a*) in contravention of the Constitution and (*b*) in contravention of the rules, and (2) that if Sri C. D. Venkataraman and Sri K. Rajagopalan were not regularly appointed as Subordinate Judges their appointments as District Magistrates—this office being one to which they were promoted from the office of the Subordinate Judge—were also invalid. These in brief were the steps in his argument to sustain the relief of *quo warranto* sought in W.P. Nos. 1353 and 1354 of 1956. These arguments I shall consider in that order as to whether the appointment as Subordinate Judges of Sri C. D. Venkataraman and Sri K. Rajagopalan who had before that date held the posts of Presidency Magistrates were constitutionally invalid.

Before the relevant provisions of the Constitution are referred to it would be necessary to set out the position under the Government of India Act, 1935, as these two officers were appointed as Presidency Magistrates before the Constitution and as the rules in relation to the recruitment and conditions of service of the several services which had been framed under the Government of India Act, 1935 and had been in force before the Constitution continued to be in operation under Article 313 of the Constitution itself. Section 241 of the Government of India Act, 1935, enabled rules to be made in relation to the recruitment and conditions of service of persons to the civil services of the Crown in India. This was subject to the overriding power vested in the Governor-General and Governor to relax the rules so as not to cause hardship in individual cases. I shall have to consider the effect of this provision in more detail later and it is therefore convenient to set it out here.

"241 (5) : No rules made under this section and no Act of any Legislature in India shall be construed to limit or abridge the power of the Governor-General or a Governor to deal with the case of any person serving His Majesty in a civil capacity in India in such manner as may appear to him to be just and equitable:

Provided, that, where any such rule or Act is applicable to the case of any person, the case shall not be dealt with in any manner less favourable to him than that provided by that rule or Act.

The main portion of section 341 contained the general rule applicable to all services but the statute also contained special provisions in relation to judicial officers and of these those relevant in the present context are sections 254 and 255 of the Act. Sections 254 and 255 ran in these terms :

254. *District Judges, etc.*—(1) Appointments of persons to be, and the posting and promotion of District Judges in any Province shall be made by the Governor of the Province exercising his individual judgment, and the High Court shall be consulted before a recommendation as to the making of any such appointment is submitted to the Governor.

(2) A person not already in the service of His Majesty shall only be eligible to be appointed a District Judge if he has been for not less than five years a barrister, a member of the Faculty of Advocates in Scotland or a pleader and is recommended by the High Court for appointment.

(3) In this and the next succeeding section the expression "District Judge" includes Additional District Judge, Joint District Judge, Assistant District Judge, Chief Judge of a Small Cause Court, Chief Presidency Magistrate, Sessions Judge, Additional Sessions Judge, and Assistant Sessions Judge.

255. *Subordinate Civil Judicial Service.*—(1) The Governor of each Province shall, after consultation with the Provincial Public Service Commission and with the High Court, make rules defining the standard of qualifications to be attained by persons desirous of entering the subordinate civil judicial service of a Province.

In this section, the expression "subordinate civil judicial service" means a service consisting exclusively of persons intended to fill civil judicial posts inferior to the post of District Judge.

(2) The Provincial Public Service Commission for each Province, after holding such examinations, if any, as the Governor may think necessary, shall from time to time out of candidates for appointment to the subordinate civil judicial service of the Province make a list or lists of the persons whom they consider fit for appointment to that service, and appointments to that service shall be made by the Governor from the persons included in the list or lists in accordance with such regulations as may from time to time be made by him as to the number of persons in the said service who are to belong to the different communities in the Province.

(3) The posting and promotion of, and the grant of leave to, persons belonging to the subordinate civil judicial service of a Province and holding any post inferior to the post of District Judge, shall be in the hands of the High Court but nothing in this section shall be construed as taking away from any such person the right of appeal required to be given to him by the foregoing provisions of this chapter, or as authorising the High Court to deal with any such person otherwise than in accordance with the conditions of his service prescribed thereunder.

It will be seen from the above that there was no specific provision in the Government of India Act, 1935, in relation to the appointment or promotion of personnel constituting the criminal magistracy but that the same were left to be governed by the exercise of the executive powers of the Governor subject to the rules which might be made in that behalf under section 241 of the Act. In saying this I am omitting from consideration section 256 as the same is not very relevant for the purpose of the present case.

The content of the rules which were framed under section 241 of the Government of India Act or which had been continued by reason of the provisions of section 276 of that Act in relation to the Madras Subordinate Civil Judicial Service as it stood and which are relevant to the points arising here were briefly thus. The service was to consist of (*a*) the Judge of the City Civil Court, Madras; (*b*) Subordinate Judges ; (*c*) Puisne Judges of the Court of Small Causes ; and (*e*) District Munsifs. Subordinate Judges were to be recruited by promotion from District Munsifs (*vide* rules 2 and 3).

The contention strenuously urged by Mr. Nambiar was that under the special rules governing the Subordinate Civil Judicial Service whose operation was continued under Article 313 under which Subordinate Judges formed one of the categories of "officers of the Subordinate Civil Judicial Service" recruitment could only have been by promotion from the ranks of the District Munsifs and that the appointment of Mr. C. D. Venkataraman who held the office of a Presidency Magistrate before his appointment as a Subordinate Judge was in contravention of the rules. He further urged that under Article 234 of the Constitution a Subordinate Judge was a member of the Judicial Service of the State other than a District Judge and that the appointment of a person to such an office had to be made by the Governor in accordance with the rules made by him in that behalf after consultation with the State Public Service Commission and with the High Court, the argument being

that the appointment of Mr. C. D. Venkataraman was neither in accordance with any rules framed nor after consultation with the authorities named in the article. It would have been noticed that Sri C. D. Venkataraman was appointed as the Subordinate Judge on 8th February, 1952, in pursuance of the power vested in that behalf by G.O. No. 668, dated 22nd March, 1951. If this Government Order operated as a rule or even otherwise enabled this appointment to be made, there was no dispute that the appointment would be valid. The contention urged by Mr. Nambiar was directed to challenge the legality and effect of this Government Order. Three points were urged against the Government Order in this connection. The first which I might term the fundamental objection was that the amalgamation or integration of the Civil Judicial Service and the criminal judiciary was unconstitutional and that the Government Order which gave effect to this scheme violated Chapter VI of Part VI of the Constitution. The second was more in the nature of a procedural objection, namely, that the formalities required by Article 234 were not complied within that there had been no consultation with the State Public Service Commission before the Government Order was issued and also before the appointment of Sri C. D. Venkataraman. Lastly, counsel urged that even if he were wrong on these two points, G.O. No. 668 did not on its terms purport to be a rule varying the service rules which operated on that date under Article 313 and could not therefore have the effect of enabling the appointment to be made.

I consider it convenient to deal with these three points in that order. The first point was formulated in this way. The recruitment of persons to fill the posts of Subordinate Judges was governed by Article 234 of the Constitution as these offices constituted civil judicial posts as defined in Article 236 (*b*). Articles 233 to 236 were contrasted with Article 237 which dealt with "magistrates" or the persons holding criminal judicial posts, to adapt a term. The point urged was that the Constitution intended to treat "civil judicial posts" as forming a category wholly different from "magisterial posts" and that it did not contemplate and even negatived the possibility of a magistrate being appointed to a civil judicial post. It was further urged that even if a rule were made under Article 237 applying with or without variation the rules in Articles 233 to 235 to magisterial posts, that would not result in any "integration" but would only serve to bring into existence two paralled services each having identical rules as to recruitment, control and conditions of service. From these premises the logical result sought to be adduced was that there could be no appointment of a magistrate as a subordinate Judge or of a person holding a civil judicial post to a post as a magistrate.

I am unable to agree that the Constitution intended to preserve and perpetuate for ever the dichotomy between civil judicial service and the magisterial service or that the Constitution laid or lay an embargo on magistrates being appointed to civil judicial posts like Subordinate Judges or District Munsifs. In the first place the definition of District Judges includes "Chief Presidency Magistrate, Additional Chief Presidency Magistrate, Sessions Judge, Additional Sessions Judge and Assistant Sessions Judge" so that at the level of the District Judge there is no distinction made between those dicharging purely civil judicial functions and those administering the criminal law. This would indicate that the provisions in this chapter conceived the two services as not having between them any irremovable barrier. The definition of "judicial service" would also appear to support this last conclusion for it proceeds on the basis of the post of a "District Judge" being a "civil judicial post" notwithstanding he as Sessions Judge administers criminal law for it refers to the inferior posts as "other civil judicial posts". The District Judge in Article 236 (*b*) has to be understood in the sense as it appears in the definition in clause (*a*) of Article 236 and as therefore including, say, the Presidency Magistrates. Article 236 therefore far from maintaining an inseparable division between the categories of officers who administer civil law and whose service was termed "civil judicial" and those who administer criminal law and were called "magistrates" would appear to view the functions of the two categories of officers as if they could be comprised in one service. Any other construc-

tion would make Article 237 really unnecessary or meaningless. Under Article 309 rules could be framed for any service including of course the magisterial service and it contains no embargo on making a rule under that Article similar to those contemplated by Articles 233 to 235. Therefore if the two services—the civil judicial and the magistrates—were to run on parallel lines, even after a notification under Article 237 the latter article would perform no function. In my judgment Article 237 has been enacted by way of abundant caution and serves as a pointer to the intention of the framers of the Constitution who had in Article 50 directed the State to take steps to separate the judiciary from the executive. Viewed in this light it appears to me that if Article 237 were availed of, its effect would be to expand the definition of "judicial service" in Article 236 (*b*) so as to comprehend the class of magistrates also. Further the entire argument on which the unconstitutionality of "integration" rests on the use of the expression "exclusively" in the definition of judicial service in Article 236 (*a*). Even taking it literally I do not consider that it precludes a magistrate being appointed to a "civil judicial post". The reference in this definition is to "posts" and not to cadres or categories and the only constitutional requirement is that under Article 234 under which the rules in relation to appointments to these posts should be framed in the manner there laid down or that appointments to these posts should be preceded by the consultation with the authorities named depending on the proper interpretation of the article. I am therefore of the opinion that the provision for the appointment of a Presidency Magistrate as a Subordinate Judge is not in contravention of Chapter VI of Part VI of the Constitution.

The second point urged in attack on the G.O. No. 668 was that there had been no consultation with the Public Service Commission before its issue and that this violated Article 234 is not easy to construe there being an ambiguity as to whether the consultation referred to in the article is with reference to the "appointments" with which the article opens or to the framing of the rule in pursuance of which the appointments should be made. In other words, the question is whether "the rule" mentioned in the article is merely a reference to a rule under Article 309 or whether Article 234 confers an independent rule-making power subject to the specific condition that it should be framed in consultation with the Public Service Commission and the High Court and Mr. Nambiar urged the latter for my acceptance. In support of the former interpretation the following might be urged. Under Article 309 the power of regulating the recruitment and conditions of service of persons appointed to the public service is, subject to the provisions of the Constitution, vested in the appropriate Legislature (*vide* Item 41 of List II of Schedule VII). The proviso enables the Governor to exercise this power until provision in that behalf is made by the Legislature and subject to such legislation. In the construction contended for by Mr. Nambiar that Article 234 confers an independent rule-making power on the Governor, *i.e.*, on the Executive, subject to the conditions set out in the article, if accepted, it would mean that such rules framed by the Executive would be outside the legislative power of the State Legislature to modify them under the first paragraph of Article 309. This is certainly a weighty consideration against the acceptance of this construction. This is because it may not be proper to read the conditions namely consultation with the Public Service Commission and the High Court as conditions which would govern legislation by the State Legislature. These considerations under Article 234 might point to the construction that under Article 234 it is at the stage of an appointment that the consultation referred to in the article is brought in and that the rules referred to, are rules framed under Article 309 subject to the exercise of legislative power under the main part of that article.

Though I was at first inclined to accept this as a proper interpretation of the article by reason of the consideration set out above, I have persuaded myself though with considerable hesitation, to accept Mr. Nambiar's argument. The absence of a comma or other punctuation mark in the article which could serve to specify "the appointment" as the event which requires the consultation appeared to me very significant. In the absence of any punctuation mark the grammar of the

article seemed to point to the consultation referred to being in relation to the making of the rule. This conclusion is more than strengthened—and in fact this last one I consider as of overwhelming weight—by the terms of Article 237. It refers to the "foregoing provisions of this Chapter and any rules made thereunder" and there is no other article in the Chapter which refers to any rules made under it except Article 234. The reference to the rules in Article 237 must therefore have been to the rules made under Article 234 which necessarily meant (*a*) that the rules might be made under Article 234 and (*b*) that these rules required prior consultation of the authorities named before they are made.

This construction appears also to derive support from the terms of section 255 of the Government of India Act, 1935, which might be termed the predecessor of Article 234. Section 255 (1) referred to the rules being made by the Governor after consultation with the Provincial Public Service Commission and the High Court though these rules were for defining the standards of qualifications to be attained by persons desirous of entering the subordinate civil judicial service and Article 234 is wider.

If the last were the proper construction of Article 234, it would appear that G.O. No. 668, dated 22nd March, 1951, which purported by executive action to alter the existing rules in relation to the recruitment to the civil judicial service of the State could not have effect as a rule under Article 234 because there was no prior consultation with the Public Service Commission.

If G.O. No. 668 was not a rule and the existing rules did not enable the Governor to appoint a Subordinate Judge by promoting a Presidency Magistrate to that office, there might be a doubt whether the original appointments of Sri C. D. Venkataraman and (of Sri K. Rajagopalan) as Subordinate Judges in 1952 were strictly in accordance with law.

This however does not conclude the question. The relevant rules were in terms and in accordance with the law altered by G.O. No. 3114, dated 6th October, 1953 and these were framed after consultation with the Public Service Commission. These rules were given retrospective effect as and from 22nd March, 1951. In my judgment whatever informality or irregularity there might have been in the first appointment of these two officers as Subordinate Judges this was regularised and made legal by G.O. No. 3114, dated 6th October, 1953. Moreover even on the basis that Article 234 required the actual appointment as distinct from the rules relating to appointments having to be made in consultation with the High Court and the Public Service Commission, these formalities were all satisfied when the two officers having been interviewed by the Public Service Commission were confirmed in the appointments as Subordinate Judges by G.O. No. 2707, dated 8th September, 1954. After that date their appointments as Subordinate Judges were valid from whichever angle they might be viewed with the consequence that their appointments as District Magistrates subsequently are also valid.

The last point has reference to the form of G.O. No. 668 and in particular to the contents of its paragraph 3 reading :

"Separate orders will issue in Public (Spl.) and Home Departments in regard to the issue of or amendment to the relevant rules".

All these relevant rules were issued in G.O. No. 3114, dated 6th October, 1953. In my judgment the point raised is not really of any substance and for the reason already stated in the concluding portion of the previous paragraph. When the rules formally altering the previous service rules were issued in October, 1953, they were brought into force from the earlier date 22nd March, 1951, when G.O. No. 668 of 1951 was issued. Mr. Nambiar contended that the Government had no power to give retrospective effect to the rules so as to validate appointments made before the rules were actually made. I do not however consider that he was well-founded in this submission. It is unnecessary for the purpose of the *quo warranto* writ to finally decide the status of Sri C. D. Venkataraman during the period

8th February, 1952 and 6th October, 1953, *i.e.*, between his factual appointment as Subordinate Judge and when he could without any doubt or controversy have been appointed to that post. I therefore hold that whether G.O. No. 668 of 1951, dated 22nd February, 1951, was valid or not as a rule under Article 234 when it was issued and even if it did not operate as a formal amendment of the rule in relation to the recruitment of officers to civil judicial service, the legality of the appointment of Sri C. D. Venkataraman was not open to any infirmity after 6th October, 1953.

The next point to be considered is as regards the validity of the actual appointment of Sri C. D. Venkataraman to the post of a Subordinate Judge though this is in the light of my conclusions already expressed really academic. Under Article 234 as I have construed it the executive power of the State in relation to the appointment has to be exercised in accordance with the rules made after consultation with the State Public Service Commission and the High Court. Mr. Nambiar contended that there had been a contravention of Article 234 in regard to the actual appointment in respect of both these matters. The contravention was said to be on two points: (1) that on the date of Sri C. D. Venkataraman's appointment as Subordinate Judge there was no specific rule enabling the appointment to be made. No doubt G.O. Mis. No. 400, dated 26th January, 1950, had introduced into the existing service rules framed under section 241 of the Government of India Act and which was continued in force under Article 313 of the Constitution, the power of relaxation which was contained in section 241 (5) of the Government of India Act which had not been reproduced into the Constitution. This relaxation was in these terms :

"Under rule made under section 241 (2) (*b*) of the Government of India Act, 1935 and continued in force by Article 313 of the Constitution and no rule made under the proviso to Article 309 of the Constitution shall be construed to limit or abridge the power of the Governor to deal with the case of any person serving in a civil capacity under the Government of Madras in such a manner as may appear to him just and equitable.

This power, it was said, would enable the executive to disregard an existing rule but that the power to disregard a rule could not itself serve as an independent rule on the basis of which alone an appointment could be made under Article 234. Under the rules framed under section 241 which were in force on the date of the appointment, the argument ran, Subordinate Judges could be recruited only from the category of District Munsifs and the mere relaxation of this would not enable an appointment to be made from outside the category of Munsifs. Mr. Nambiar further contended that relaxation could have a meaning when the rules prescribed a plurality of qualifications for appointment when one of the several requisite qualifications could be waived by reason of the relaxation but in cases where the rule prescribed only a single qualification a relaxation of that rule would not have the effect of permitting an appointment to be made without reference to the qualification. In the view however I have taken of G.O No. 668, dated 22nd March, 1951 and G.O. No. 3114, dated 6th October, 1953 and regarding the effect of the later Government Order on validity of the appointment of Sri C. D. Venkataraman as Subordinate Judge I do not consider it necessary to discuss or decide the question from the angle here presented.

The next ground urged was as regards the consultation which ought to precede an appointment under Article 234 a contention which would arise only if the article was read as imposing conditions as to appointment. In the case of Sri C. D. Venkataraman the High Court was certainly consulted before his appointment (and this applies to the appointment of Sri Rajagopalan also). The question is whether the failure to consult the Public Service Commission at the date of the appointment would render it invalid. This would depend upon whether the requirement as to consultation was directory or mandatory Mr. Nambiar urged that I should hold the requirement to be mandatory as both under the Government of India Act, 1935 and under the Constitution the requirement has been put in on grounds of public policy to secure a public purpose namely the avoidance of political pressure in the matter of appointments. I do see considerable force in this argument but I am relieved of the task of finally deciding this point in view of what

happened subsequently. Both Sri C. D. Venkataraman (and Sri Rajagopalan) were subsequently interviewed by the Public Service Commission and their appointments were confirmed. After this was done G.O. No. 2707, dated 8th September, 1954 was passed. That Government Order recited that the Government had decided in consultation with the High Court and with the concurrence of the Madras Public Service Commission to relax the relevant rules to enable these officers to be appointed regularly to the Madras State Judicial Service. Whatever therefore might have been the defect in the appointment of Sri C. D. Venkataraman when he was appointed as a Subordinate Judge in 1952, every defect was removed and every formality was complied with when after G.O. No. 3114, dated 6th October, 1953 was passed and the rules modified enabling Presidency Magistrates to be appointed as Subordinate Judges. Sri C. D. Venkataraman was confirmed in the appointment as Subordinate Judge after consultation with the Public Service Commission and the High Court. Thereafter every requirement of Article 234 as urged before me by Mr. Nambiar was satisfied when this confirmation took place in 1954. I therefore hold that the appointment of Sri C. D. Venkataraman as Subordinate Judge was valid when made in February, 1952, by the retrospective operation of G.O. No. 3114 of 1953 and that in any event it was certainly valid from and after September, 1954, when G.O. No. 2707 took effect.

The next question is whether Mr. C. D. Venkataraman having been validly appointed as a Subordinate Judge could have been appointed as a District Magistrate. A special cadre called the Madras Criminal Judicial Service, as has already been stated, which was to consist of District Magistrates was created by G.O. No. 760, dated 27th February, 1950. I have heard no arguments challenging the validity of the creation of this service. Indeed not even the objection such as was raised to the promotion of a Presidency Magistrate to the post of a Subordinate Judge based on Chapter VI of Part VI of the Constitution could be urged as against it. Section 10, Criminal Procedure Code enacts :

"10 (1) : In every district outside the presidency towns the Provincial Government shall appoint a Magistrate of the first class, who shall be called the District Magistrate."

The Code of course does not prescribe the qualifications that should be possessed by an appointee or the service from which he could be recruited. Nor does the Constitution prescribe any conditions as regards appointment to that office. Nothing can therefore be said to question the legality of the creation of the Madras Criminal Judicial Service under G.O. No. 760, dated 27th February, 1950. Sri C. D. Venkataraman and (also Sri Rajagopalan) were Subordinate Judges and therefore they could under the rules governing the Madras Criminal Judicial Service be appointed to the posts of District Magistrates. The conclusion to which I have arrived therefore is that both C. D. Venkataraman and (also K. Rajagopalan) were validly appointed as District Magistrates and the challenge to the validity of their appointments in the two petitions for the issue of writs of *quo warranto* fail.

In this view, I do not consider it necessary to discuss the argument urged in regard to the course that I should take if the appointment were in fact found to be irregular or invalid. Mr. Venkatasubramania Ayyar contended that even if the appointments were invalid no writ of *quo warranto* ought to issue because of the long delay which had occurred between the appointment and the date of the petition coupled with the failure on the part of the affected parties to move this Court at an earlier date. He further urged that the issue of a writ at this stage would result in invalidating every official act performed by these officers as Magistrates and Judges which would lead to such an amount of public inconvenience and mischief. that the Court should in the exercise of its discretion refuse the issue of a writ. On the other hand, Mr. Nambiar contended that the issue of a writ would not automatically render invalid the acts of these officers and that would really result in amotion without this having any effect upon the validity of the judicial or administrative acts when they were *de facto* in possession of the office. As I have already stated, in view of the conclusion that I have reached that the appointment of these officers is valid I do not propose to spend any time in discussing the relative merits of the contentions on either side.

The result is that W.P. Nos. 1353 and 1354 of 1956 fail and are dismissed. There will however be no order as to costs.

I shall now proceed to consider W.P. No. 1131 of 1956 filed by C. D. Venkataraman questioning the legality of the order of Government varying the seniority of the petitioner in May, 1956 and altering to his prejudice the seniority accorded to him and recognised by the Government in G.O. Mis. No. 2707, dated 8th September, 1954.

I shall now briefly recapitulate the facts necessary to appreciate the points arising for decision in W.P. No. 1131 of 1956. The petitioner Sri C. D. Venkataraman was, as has already been pointed out, temporarily appointed as a Presidency Magistrate on 18th June, 1946. This post was thereafter treated as an addition to the cadre of the Madras Civil Service executive branch. After the completion of the separation of the State Judiciary from the executive, the post of a Presidency Magistrate was directed to be treated as equivalent to the posts in the cadre of corresponding officers performing civil judicial functions. This was under G.O. No. 668, dated 22nd March, 1951 and under paragraph 2 (II) of this Government Order the posts of Subordinate Judges were directed to be filled up by officers in the category of District Munsifs, Sub-Divisional Magistrate or Presidency Magistrates. That Government Order also by paragraph (II) (*v*) treated the existing Presidency Magistrates as members of the Madras State Judicial Service. This was how the integration of the two services became effected. As Presidency Magistrates and District Munsifs had before that date belonged to different services the *inter se* seniority between the two categories had to be fixed. This was done on the basis of the pay the officers were drawing on 22nd March, 1951, the date of the Government Order. This however caused a considerable amount of dissatisfaction to the existing Subordinate Judges and Senior District Munsifs who had been recruited to Madras Civil Judicial Service years before 1946 when Sri C. D. Venkataraman was first appointed as a Presidency Magistrate. This fixation was effected after consultation with the High Court. Subsequently on 8th February, 1952, the petitioner Sri C. D. Venkataraman was appointed as a Subordinate Judge and was posted as a City Civil Judge. In the Civil Judicial List he was shown as having the rank and seniority amongst the Subordinate Judges in accordance with the G.O. No. 668, dated 22nd March, 1951. The existing Subordinate Judges and the Senior District Munsifs contended that the appointment of a Presidency Magistrate as a Subordinate Judge was unconstitutional as well as contrary to the rules relating to the Civil Judicial Service. It was urged that the Subordinate Judges who had been appointed to the Civil Judicial Service years before 1946 when Sri C. D. Venktaraman was appointed as a Presidency Magistrate were unjustly deprived of their seniority by the ranking effected under paragraph II (*v*) of G.O. No. 668. The Government however rejected this representation. An objection was also raised by the Public Service Commission that they should have been consulted before the appointment of Presidency Magistrates as Subordinate Judges. The petitioner and four other officers who were like him recruited as Presidency Magistrates and subsequently were posted as Subordinate Judges were interviewed by the Public Service Commission who approved of their appointment. This was formally given effect to by G.O. No. 2707, dated 8th September, 1954. The seniority assigned to them by the High Court when Sri C. D. Venkataraman was appointed as a Subordinate Judge in 1952 was continued.

While things were in this stage, Sri C.D.Venkataraman was appointed as District Magistrate of Tiruchirappalli on 1st January, 1955. The post of a District Magistrate was under G.O. No. 760, dated 27th February, 1950, to be filled up by promotion from the category of Subordinate Judges and Sri C. D. Venkataraman was appointed to this post because of the seniority which he enjoyed among the Subordinate Judges. Several appeals were filed by Subordinate Judges against the ranking effected by G.O. No. 668 of 1951 as modified by subsequent Government Orders which had resulted in Sri C. D. Venkataraman being senior to several others entitling him to promotion as District Magistrate. The Government considered these

objections as having some validity and by G.O. No. 1463, Home Department, dated 16th May, 1956, refixed the seniority of the five Subordinate Judges who were originally recruited as Presidency Magistrates among the Subordinate Judges as and from the date when they actually took charge as Subordinate Judges in the year 1952. The Government by the Government Order requested th High Court to refix the seniority of these officers on this new basis. This necessarily resulted in the petitioner Sri C. D. Venkataraman being assigned a seniority 10 places lower than that which he originally held under G.O. No. 668, dated 22nd March, 1951.

The contention urged in the petition was that when once the Government had in consultation with the High Court fixed by G.O. No. 668, dated 22nd March, 1951, *inter se* seniority between the Presidency Magistrates and members of the Madras Civil Judicial Service on the basis of the salary drawn by the officers and had applied this to him when his service was regularised in 1954 there was no power in the Government to revise or refix the seniority departing from the principle upon which the original fixation was made.

The main grounds urged in the petition in support of this attack on the validity of G.O. No. 1463, dated 16th May, 1956 were : (1) The order of the Government violates the provisions of the Article 311 of the Constitution which enacts that no member of a civil service shall be reduced in rank without being given a reasonable opportunity of showing cause against the proposed reduction. (2) Under Article 235 of the Constitution the control over the posting and promotion of persons belonging to the judicial service of the State holding posts inferior to that of a District Judge is vested exclusively in the High Court and this precludes the State Government from interfering with the seniority of persons so as to prejudicially affect their promotion in the service. (3) G.O. No. 668 had fixed the seniority on proper principles and there was therefore no justification for interfering with the seniority thus fixed.

The learned Advocate-General who appeared for the State in opposition to this writ urged that the impugned order, dated 16th May, 1956 did not violate any legal right vested in the petitioner—legal rights which were justiciable or capable of enforcement by Courts. Before however dealing with the submission of the learned Advocate-General, I shall set out and discuss the contention urged by Mr. Venkatasubramania Ayyar. The steps in his argument were these :—

(1) When G.O. No. 668 was issued, Sri C. D. Venkataraman was a Presidency Magistrate. Under that G.O. the Presidency Magistrates were placed in the same position as District Munsiffs as regards their qualifications for promotion as Subordinate Judges. Before that date the Presidency Magistrates and District Munsifs were members of two different services. There was therefore necessity to define *inter se* seniority between the District Munsifs and the Presidency Magistrates for determining the priority for promotion as Subordinate Judges. The District Munsifs had been recruited from, *inter alia*, advocates of three to six or seven years' standing. Sri C. D. Venkataraman and others along with him had been recruited as Presidency Magistrates when they had practised for nearly 14 years. Some allowance had to be made for this basic difference in the qualifications of the appointees. The Government had in consultation with the High Court considered that the pay drawn by the officers on the date of the G.O. was the most equitable criterion and seniority was directed to be fixed in accordance with that rule. There was therefore no injustice to the several officers in the judicial service in assigning the rank on this basis.

(2) This seniority had been maintained throughout and was indeed the basis upon which the promotion of Sri C. D. Venkataraman had taken place as a District Magistrate. The Government however had acceded to the memorials and representations by the other officers and without giving an opportunity to the petitioner of being heard had passed an adverse order reducing the petitioner's rank. This was therefore in violation of the principles of natural justice.

(3) When once the seniority had been fixed a vested right is acquired by that officer to that rank and seniority and this cannot be interfered with by the

Government except as a punishment and admittedly in this case this was not the ground of reduction.

(4) In order to enable the petitioner to relief by the issue of a writ of *certiorari* no justiciable right of his need be violated and it is sufficient if there is an infraction of some rule which adversely affects the petitioner.

I shall put out of account the ground urged in the petition based on violation of Article 311 that there had been a "reduction in rank" within the meaning of that article which had been effected without a reasonable opportunity being afforded to him against such action. Mr. Venkatasubramania Ayyar frankly and I would add very properly, stated that the reduction in rank contemplated by the article was reduction as a punishment and that as in this case no punishment was involved the article had no application. Flowing from this construction of Article 311 that it does not apply to "any reduction in rank" not ordered as a punishment the learned Advocate-General urged that any other variation in the order of seniority to the prejudice of an officer in the civil service could not give rise to a right whose violation could be remedied by invoking the jurisdiction of the Court under Aritcle 266. The Madras State and Subordinate Services General Rules enact the following provisions for determining the seniority among the several officers in the State Subordinate Service :

"35 (*a*) : The seniority of a person in a service, class, category or grade shall, unless he has been reduced to a lower rank as a punishment, be determined by the date of his first appointment to such service, class, category or grade. . . . .

(*b*) The appointing authority may, at the time of passing an order appointing two or more persons simultaneously to a service, fix either for the purpose of satisfying the rule of reservation of appointments or for any other reason, the order of preference amongst them ; and where such order has been fixed, seniority shall be determined in accordance with it.

(*c*) The transfer of a person from one class or category of a service to another class or category carrying the same pay or scale of pay shall not be treated as first appointment to the latter for purposes of seniority; and the seniority of a person so transferred shall be determined with reference to the date of his first appointment to the class or category from which he was transferred. Where any difficulty or doubt arises in applying this sub-rule, senority shall be determined by the appointing authority".

This was the General Rule and under rule 2 of these rules:

"If any provision in the General Rules contained in this part is repugnant to a provision in the Special Rules applicable to any particular service. . . . the latter shall, in respect of that service prevail over the provision in the General Rules in this part".

The provision in the Special Rules applicable to the Madras State Judicial Service to which the officers in these petitions belonged was in these terms :

"20. The seniority of a person in a category of the service shall, unless he has been reduced to a lower rank as a punishment, be determined by the date of his first appointment to such category. . . . . . The appointing authority may, at the time of passing an order appointing two or more persons simultaneously to either category in the service either for the purpose of satisfying the rule of reservation of appointments or for any other reason, fix the order of preference among them ; and where such order has been fixed, seniority shall be determined in accordance with it. Where any difficulty or doubt arises in applying this rule, seniority shall be determined by the appointing authority".

It will be seen that there is not much difference between the operation of the two sets of rules. If these rules had been strictly followed, the seniority of Sri C.D. Venkataraman who was appointed as a Subordinate Judge in 1952, which formed a category of the State Judicial Service, had to be determined by the date of his first appointment to such office. But by reason of other factors including his age, his qualifications in the shape of his standing in the Bar as well as the office of the Presidency Magistrate which he held before the date of his appointment to the category of Subordinate Judge, he was justly assigned a rank in relation to the pay which he then drew. This was effected by the exercise of the power of relaxation in G.O. 400 dated 26th January, 1950 which incorporated the provisions theretofore contained in section 241 (5) of the Government of India Act, 1935, into the rules wich were continued in operation by Article 313. It was this departure from and relaxation of the rule, which was complained of by the other members of the service who had been recruited as District Munsifs. The question now for consideration is whether the Government having once fixed the seniority by relaxing

the rule 20 of the Speical Rules, have the power to refix the seniority by assigning to the officer a rank lower than what he originally held but not below that to which he would have been entitled by a strict application of rule 20. This is slightly a different approach from that involved in an enquiry as to whether any legal right of the officer has been violated giving rise to the interference by the Courts in what is ultimately an administrative matter, and it is with this background that I consider it proper to discuss the submissions of the learned Advocate-General. His argument was in these terms :—Article 310 (1) emphasises the common law concept of service under Government being held at the pleasure of the Government and unless there is any express provision in the Constitution the rule that governs their relationship is that it is terminable, and the conditions of service, variable at the pleasure of the State. Section 310 (1) is in these terms :

"310 (1). Except as expressly provided, by this Constitution, every person who is a member of a defence service or of a civil service of the Union or of an all-India service or holds any post connected with defence or any civil post under the Union holds office during the pleasure of the President, and every person who is a member of a civil service of a State or holds any civil post under a State holds office during the pleasure of the Governor or, as the case may be, the Rajpramukh of the State."

The express provision in the Constitution that is referred to in the opening words of the article is to be found in Article 311 which provides a statutory protection of two classes: (1) which is absolute and which is contained in Article 311 (1) against being dismissed or removed from service by an authority subordinate to that by which the officer was appointed. When a violation of this provision occurs the result is really one where "the pleasure of the Governor" is not expressed. In other words, the dismissal or removal is merely a purported act not being the expression of the pleasure within Article 310 (1) and is therefore null. This proposition is certainly acceptable as it flows from the language of Articles 310 (1) and 311 (1) read together and it is also supported by the decision of the Privy Council in *Lall's case* (*High Commissioner for India* v. *I. M. Lal*)[1], where their Lordships of the Judicial Committee designedly used the expression at pages 65 and 67 of the report " purported " in reference to the declaration as to the dismissal which ought to be granted to the officer.

The next point urged was in relation to the scope and legal effect of Article 311 (2) which affords statutory protection to the officers in relation to three types of punishment. The Civil Services (Classification, Control and Appeal) Rules which regulated the conditions of service, the discipline and conduct of officers in the civil service of the Crown in India before the Government of India Act, 1935, provided for seven types of punishment :—(1) censure ; (2) withholding of increments or promotion; (3) reduction to a lower post or time scale or lower stage in a time scale ; (4) recovery from pay of the whole or any part of any pecuniary loss caused to the Government by negligence or breach of orders ; (5) suspension ; (6) removal from the civil service of the Crown which does not disqualify from future employment and (7) dismissal from the service of the Crown which ordinarily disqualifies from future employment.

Out of these seven punishments, section 240 (3) of the Government of India Act had selected two, dismissal which by definition included removal from service and reduction in rank and had added a constitutional backing to the provision in the service rules which required that the officer should have a reasonable opportunity of showing cause before these punishments were inflicted. The Constitution re-enacted this section in Article 311 with the removal from service being taken for a definition into the section itself. Based on that, it was urged by the learned Advocate-General that the rule of *expressio unius* was attracted and that the service rules whose violation could give rise to enforceable claims were (*a*) in relation to punishments, (*b*) the punishments being restricted to the three named and (*c*) even in regard to them the only complaint which could be urged by the officer was that he was not afforded an opportunity to show cause. Beyond this area of constitutional protection it was said that the normal rule that Government servants held their office at pleasure applied and that any violation of the service

1. (1948) 2 M.L.J. 55: L.R. 75 I.A. 225: 1948 F.L.J. 23: (1948) F.C.R. 44 (P.C.).

rules would not give rise to claims such as would be agitated in Courts of law. He also urged that even if the basic relationship between the Government and these officers were treated as that between master and servant and there were stipulations governing service conditions, these could not be specifically enforced by Courts and that the interference prayed for by Sri C. D. Venkataraman would, if granted virtually amount to the specific performance of a service condition.

These submissions deserve careful consideration. I shall examine the position historically. Upto the enactment of section 96-B by the Government of India Act, 1919, the tenure of Crown servants was wholly at pleasure and though undoubtedly there were manifold and diverse rules, special and general, in relation to the several services, any infraction of the rules could have been remedied only by departmental appeals if any or by memorials to authorities and on the basis that no legal or justiciable rights were involved, the tenure being one merely at pleasure, the civil Courts could not afford any relief.

Section 96-B was then introduced into the Government of India Act, 1915, by an amendment effected in 1919. It should however be remembered that statutory safeguard that was provided by section 96-B was only against dismissals by authorities subordinate to that by which he was appointed. The section further conferred on the executive power to make rules regulating the conditions of service of officers in the civil service and after vesting in the Secretary of State the ultimate power in regard to every servant of the Crown imparted statutory validity to the conditions then in force. The question which was raised on the construction of this provision and which the Judicial Committee had to consider in *Venkata Rao's case* (*R. Venkata Rao* v. *Secretary of State for India in Council*)[1] was whether the provisions of the section so modified the law that the tenure of the service ceased to be one at pleasure, the service conditions becoming so to speak statutory terms of a contract governing the relationship between the Government and their servants. Their answer was in these terms :—

> " Section 96-B in express terms states that office is held during pleasure. There is therefore no need for the implication of this term and no room for its exclusion. The argument for a limited and special kind of employment during pleasure but with an added contractual term that the rules are to be observed is at once too artificial and too far-reaching to commend itself for acceptance. The rules are manifold in number and most minute in particularity and are all capable of change. Counsel for the appellant nevertheless contended with most logical consistency that on the appellant's contention an action would lie for any breach of any of these rules, as for example of the rules as to leave and pension and very many other matters. Inconvenience is not a final consideration in a matter of construction but it is at least worthy of consideration and it can hardly be doubted that the suggested procedure of control by the Courts over Government in the most detailed work of managing its services would cause not merely inconvenience but confusion. There is another consideration which seems to their Lordships to be of the utmost weight. Section 96-B and the rules make careful provision for redress of grievance by administrative process and it is to be observed that sub-section (5) in conclusion reaffirms the supreme authority of the Secretary of State in Council over the civil service. These considerations have *irresistibly* led their Lordships to the conclusion that no such right of action as is contended for by the appellant exists. It is said that this is to treat the words "subject to the rules" appearing in the section as superfluous and ineffective. . . . They regard the terms of the section as containing a statutory and solemn assurance, that the tenure of office though at pleasure will not be subject to capricious or arbitrary action but will be regulated by rule. The provisions for appeal in the rules are made pursuant to the principle so laid down. It is obvious therefore that supreme care should be taken that this assurance should be carried out in the letter and in the spirit and the very fact that Government in the end is the supreme determining body makes it the more important both that the rules should be strictly adhered to and that the rights of appeal should be real rights involving consideration by another authority prepared to admit error, if error there be, and to make proper redress, if wrong has been done."

Section 96-B was in substance reproduced and re-enacted by sections 240 and 241 of the Government of India Act, 1935. The slight drafting change in the opening words of section 240 (1) as compared with the corresponding terms of section 96-B (1) which consisted in the omission of the reference to the rules as those subject to which the officer held his office was calculated to emphasise that all civil offices were held at pleasure.

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1. (1937) 1 M.L.J. 529 : L.R. 64 I.A. 55 : I.L.R. (1937) Mad. 532 (P.C.).

Section 96-B (1) read as follows :—

"96-B (1).—Subject to the provisions of this Act and of rules thereunder, every person in the civil service of the Crown in India holds office during His Majesty's pleasure, and may be employed in any manner required by a proper authority within the scope of his duty, but no person in that service may be dismissed by any authority subordinate to that by which he was appointed, and the Secretary of State in Council may (except so far as he may provide by rules to the contrary) reinstate any person in that service who has been dismissed.

If any such person appointed by the Secretary of State in Council thinks himself wronged by an order of an official superior in a Governor's province, and on due application made to that superior does not receive the redress to which he may consider himself entitled, he may, without prejudice to any other right of redress, complain to the Governor of the province in order to claim justice, and the Governor is hereby directed to examine such complaint and require such action to be taken thereon as may appear to him to be just and equitable."

A considerable portion of the argument in *Venkata Rao's Case*[1], was based on the opening words which appeared capable of being construed as if the observance of the rules which were given statutory recognition, was a necessary condition for the exercise of the "pleasure". These words were eliminated in section 240 (1) which runs :—

"240 (1).—Except as expressly provided by this Act, every person who is a member of a civil service of the Crown in India, or holds any civil post under the Crown in India, holds office during His Majesty's pleasure."

There has been some doubt expressed as to these cases excepted by the opening words of section 240 (1). As sections 200 (2) and 220 (2) which render the tenure of Judges of the High Courts and of the Federal Court one on good behaviour do not contain any statement that their provisions are an exception to the general rule these sections and others like it could not be the ones that were referred to as those "expressly excepted".

This apart, however, the only change effected by the Government of India Act, 1935, was that by section 240 (3) the statute selected two categories of punishment, dismissal (which was defined so as to include removal from service) and reduction in rank and required that before they were inflicted the officer concerned should be afforded a reasonable opportunity of showing cause against the punishment, provisions which were previously some among those in the service rules but which had been taken out of the rules and enacted in the statute itself. It was the correlation between section 240 (1) which stated that the tenure was at pleasure and section 240 (3) which brought into the statute certain service conditions and the question whether the latter provision conferred enforceable rights in the sense that without their observance 'the pleasure' could not be signified, that was debated in *Lall's Case*[2] and on appeal to Privy Council.[3] The argument addressed by the Advocate-General of India to the Federal Court in support of a submission that under section 240 the tenure of civil officers was wholly at pleasure subject to one condition that the dismissal must be by an authority not subordinate to the appointing authority, was that section 240 (3) was merely directory and that it was not an exception contemplated by the opening words of sections 240 (1). This construction was repelled by the Federal Court a decision which was affirmed by the Privy Council on appeal. Spens, C.J., who spoke for the majority of the Federal Court said referring to the safeguard provided by section 240 (3), (at page 143-144).

"It can, in our judgment, be regarded as a provision in the Constitution Act which while it does not alter the tenure of office during His Majesty's pleasure prescribed by sub-section (1) of section 240 or the power of dismissal at will, does impose in certain cases certain statutory obligations to be carried out before dismissal is effected, breach of which will give to the person adversely affected a cause of action."

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1. (1937) 1 M.L.J. 529 : I.L.R. (1937) Mad. 532 : L.R. 64 I.A. 55 (P.C.).
2. (1945) 2 M.L.J. 270 : 1945 F.C.R. 103 : 1945 F.L.J. 129.
3. (1948) 2 M.L.J. 55 : 1948 F.C.R. 44 1948 F.L.T. 23 (P.C.).

Lord Thankerton said in the Privy Council:

"The provisions of section 96-B (1), now reproduced as sub-section (2) of section 240 of 1935, and of sub-sections (2) and (3) of section 240 are prohibitory in form, which is inconsistent with their being merely permissive."

There was very little by way of change effected when section 240 was replaced by the provisions of Articles 310 and 311. Article 310 reproduced section 240 (1) while section 240 (2) was enacted as Article 311 (1). Section 240 (3) became Article 311 (2) and the change here was of a drafting nature which consisted in bringing in "removal from service" which was included in the definition of "dismissal" into the body of the article. To the extent therefore that there was any non-observance of the requirement as to reasonable opportunity insisted on by Article 311 (2), *Lall's Case*[1] is authority for the position that it gives rise to an enforceable right. The question I have to consider is whether the infraction of other rules of the service and with reference to the punishment specified in the article could give rise to an action or could be redressed by Courts. In my judgment the decision in *Venkata Rao's Case*[2], requires me to answer this question in the negative.

Even if the matter had to be decided, without reference to the history of the provisions and the decisions at various stages but only on the terms of the Constitution itself, the question has in my judgment to be answered the same way. Article 310 lays down in emphatic terms that the tenure of civil servants is "at pleasure" though subject to the opening words of clause (1) "Except as expressly provided by this Constitution" which might possibly be a reference to provisions like Articles 124 (4) and 217 (1) proviso (*b*) as to which there is some doubt and of course to Article 311 (1) and (2) and also Article 314. On the language of the article of the Constitution, the argument scarcely seems open that the "pleasure" is qualified or conditioned by the observance of the rules framed under Article 309 or other similar provisions or continued under Article 313. If I am right so far, the violation or infraction of a statutory rule would give rise to a cause of action for being agitated in Courts only if the nature of the infringement brought it within the jurisdiction of the Courts or their competency to afford relief. If the violation of a statutory rule governing governmental action caused an injury to a right enforceable in a Court, say a right to property or a right to carry on business or trade, apart from the right being guaranteed by the Constitution, the established Courts of law would be competent to afford relief. In such cases if the jurisdiction of a High Court under Article 226 were invoked, there would be ample power vested in the Court to redress the grievance. The right, however, that was infringed in the case on hand *viz.*, the reduction in seniority was an injury in relation to an office that was constitutionally declared to be held at the "pleasure" of the Governor. I do not therefore see any basis for the contention that a legally enforceable right was infringed by the reduction in seniority in the case notwithstanding there was a departure from rule 20 of the special rule. The learned Advocate-General referred me in this connection to a passage in *Joint Anti-Fascist Refugee Committee* v. *Mcgrath*[3], reading "the touchstone to justiciability is injury to a legally protected right" and I consider the test sound. The only manner in which the petitioner could urge jurisdiction in this Court to interfere in cases of this sort could be on the basis that the service rules and conditions form, as it were, limitations on the "pleasure" and that as such their violation gave rise to a justiciable grievance. I feel, however, unable to accept this construction of the articles of the Constitution on which ultimately such an argument has to be rested. No doubt the power to frame rules for the services is vested by the Constitution in the Executive and in the Legislature under Article 309 but from this the conclusion cannot legitimately be drawn that the rules when framed became part of the Constitution so as to be treated as falling within the "express exception" in the opening words of Article 310 (1).

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1. (1945) F.C.R. 103 : (1945) F.L.J. 129 : (1948) 2 M.L.J. 270 (F.C.).
2. (1937) 1 M.L.J. 529 : L.R. 64 I.A. 55 : I.L.R. 1937 Mad. 532 (P.C.).
3. 95 L.Ed. 817.

This reasoning would apply equally whether the impugned order be treated as administrative or quasi-judicial and that is the reason why I do not consider it necessary to decide the precise category into which the order would fall.

Mr. Venkatasubramania Ayyar almost bypassed these considerations and urged that there need be no violation of a legal or justiciable right to enable a party to obtain relief by way of a writ of *certiorari* if an administrative body or authority affects by its decision the interest of an individual by wrongly interpreting or applying the relevant law be it a statute or a rule made under one. In support of this submission the learned counsel relied on the decision of *R. v. Manchester Legal Aid Committee*[1]. The Legal Aid Committee set up under the Legal Aid and Advice Act, 1949, had granted a certificate taking into account the means of a bankrupt and disregarding the means at the disposal of the trustee who was the applicant for the certificate. The defendants as against whom proceedings with the aid of the certificate were launched applied for the issue of a writ of *certiorari* to quash the certificate. The Court of Appeal held that the Legal Aid Committee was a body which was bound to act judicially in the matter and was therefore one whose decisions could be the subject-matter of a prerogative writ following in this respect the principles laid down in the oft-quoted passage of Atkin, L.J., in *R.* v. *Electricity Commissioners*[2].

The next question considered by the Court was whether the applicants, the defendants in the action, could be said to have been persons aggrieved by the order of the Committee granting the certificate. It is the passage dealing with this matter that was relied on by the learned counsel in support of his submission which I have set out earlier.

> "The last question which arises is whether the applicants are persons aggrieved. If so, *certiorari* will be granted *ex debito justitiae*. . . . ."

After quoting a passage from the judgment of Lord Reading, C.J., in *Rex* v. *Richmond Confirming Authority*[3], the learned Judge (Parker, L.J.), continued :

> "Lord Reading, C.J., then continued—'I believe that to be the true principle upon which this Court acts. Here the applicant had an interest distinct from the general inconvenience which may be suffered by the law being wrongly administered.' That was a case of licensing justices having issued a licence without jurisdiction and in spite of an objection made by the applicants for *certiorari*, who were rival traders, but the principle is clearly laid down. In the present case the applicants seem to us to be persons aggrieved within this principle. They are persons who incur the risks inherent in having to fight a party who has legal aid. . . . . . It is true that if the action was fought to judgment and the applicants succeeded, they might before the trial judge, prove the matters proved before us, and persuade him that the certificate should be treated as a nullity, but it seems to us that they should not be forced to take this course."

I am unable to draw from this passage the inference or extract the principle which the learned counsel desires me to. The case is analogous to those which we have in our system wherein the defendant is entitled to object to the grant of permission to a party to conduct proceedings as a pauper. Certainly he has a legal interest in the matter and I, therefore, do not see how this helps the contention urged for the petitioner. As Parker, L.J., points out in the last of the sentences which I have extracted, the validity of the certificate could have been challenged in the action itself. If so, it would clearly be a case where a legal contention open to a party in a suit or proceeding was affected by an improper adverse order. That, in my opinion, furnishes no basis for the argument that no legal right need be infringed to enable a party to move for the issue of a prerogative writ and it is sufficient if he is merely inconvenienced or some interest of his which does not amount to a right is affected.

Before concluding I must refer to a very faint argument advanced by Mr. Nambiar, learned counsel for the respondents in the *certiorari* petition, questioning the jurisdiction of this Court to issue the writ based on the right not being available to control the proceedings of the High Court. Learned counsel urged that the impugned G.O. of 1956 had requested the High Court to refix the seniority in

1. L.R. (1952) 2 Q.B. 413.
2. L.R. (1924) 1 K.B. 171.
3. L.R. (1921) 1 K.B. 248.

accordance with the Government's decision and as it was the High Court which ultimately gave effect to the reduction, the present writ petition must be deemed to be one to quash an order of the High Court. In my judgment, there is no substance in this contention. The High Court which is not amenable to the writ jurisdiction under Article 226 is the Court dealing judicially with matters and as in the present case the function of the High Court was merely administrative and even there, it merely gave effect to a decision of Government, there is no basis for the objection raised.

In my judgment, therefore, notwithstanding that the order of May, 1956, adversely affected the interest of the petitioner in that the seniority which he enjoyed under the orders passed before that date, was seriously interfered with and this was contrary to the rules, the same cannot be redressed by this Court by the issue of a writ of *certiorari*. The petition fails. The rule *nisi* issued is discharged and the petition is dismissed. There will, however, be no order as to costs.

W.P. No. 487 *of* 1956.—Sri N. Devasahayam, the petitioner here, was appointed by the Government of Madras as an Assistant Commandant, Special Armed Police, Madras, in 1948. The appointment was in the police department and under the control and supervision of the Inspector General of Police, Madras. The services of the petitioner and others who were recruited along with him to the same category were utilised during Hyderabad Action. Subsequently when conditions returned to normal the petitioner was appointed as a Deputy Superintendent of Police on probation by G.O. 4242 (Home) dated 28th September, 1950. This was made possible by Government relaxing all the relevant provisions of the Madras Police Services Rules in favour of the petitioner. After fixing the pay scales of this officer and others similarly recruited along with him, it went on to provide :

"His Excellency the Governor also directs that the candidates should be allowed to count their service in the Special Armed Police. . . . . for purposes of increments and seniority in the Madras Police Service."

There appeared to have been representations to the Government from existing incumbents of offices in the police service who complained of this fixation of seniority of the petitioner as an unjustified infraction of their rank and seniority. These representations were considered and by an order, dated 31st March, 1956, the Government by G.O. No. 1008 (Home) accepted the representations of the other officers and refixed the seniority of the petitioner and others similarly recruited and in its operative portion passed an order stating :

"The Government, therefore, now direct that the orders in G.O.Ms. No. 4242, Home, dated 28th September, 1950, in so far as they relate to seniority of the Deputy Superintendents of Police who were recruited direct and those appointed from among Assistant Commandants, Special Armed Police. . . be reckoned strictly in accordance with the dates of their first appointment to the Madras Police Service."

By reason of this re-ranking and the re-fixing of the seniority the petitioner had lost about 15 places. Complaining of this reduction the petitioner has filed this writ petition for the grounds thus stated in paragraph 18 of the affidavit,

" the petitioner prays that this Hon'ble Court be pleased to set aside the order of the Government as illegal, invalid and inoperative, as it brings about a reduction in rank, inflicts a penalty although not so called, deprives the petitioner of a right which accrued and became vested more than five years ago and alters a condition or term on the basis of which his appointment was made."

On these allegations two points arise for consideration. (1) Whether " a reduction in rank" specified in Article 311 (2) is one which is inflicted as a punishment or whether the expression is comprehensive enough to include every readjustment of seniority. In my judgment, this is capable of only one answer. I have already in dealing with W.P. No. 1131 of 1956 set out the history of this provision and I do not consider it necessary to repeat it. Moreover the reference to a reasonable opportunity to show cause which is refereed to in the clause can have no meaning in regard to the orders refixing the seniority based on considerations of principle or policy. The petitioner cannot, therefore, complain that a constitutional safeguard enacted in Article 311 (2) has been violated.

The next point is whether a mere violation of a statutory rule in relation to conditions of service can give rise to a claim for redress by the issue of a prerogative right. For the reasons already stated in W.P. No. 1131 of 1956 I find this point against the petitioner. The result is that this petition fails. Rule *nisi* is discharged and the petition is dismissed. There will be no order as to costs.

V. S. ——— *Petitions dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE P. RAJAGOPALAN, *Officiating Chief Justice* AND MR. JUSTICE RAJAGOPALA AYYANGAR.

S. B. Adityan .. *Petitioner**

v.

S. Kandaswami and others .. *Respondents.*

Representation of the People Act (*XLIII of* 1951), *sections* 82 (*b*), 90 (3) *and* 123 (1)—*Any candidate against whom allegations of any corrupt practice are made—Who is—If includes the person who is alleged to have received the bribe—Such persons if necessary parties to an election dispute petition—Scope of section* 123 (1)—*Power of Election Tribunal to allow amendment by addition of parties—Change in law by Act* (*XXVII of* 1956) —*Civil Procedure Code* (*V of* 1908), *Order* 1, *rule* 10—*If applicable.*

The expression "any candidate against whom allegations of corrupt practice are made," in section 82 (*b*) of the Representation of the People Act, 1951, is to be construed as "any candidate who is alleged to have committed corrupt practices." Though giving and acceptance are both necessary to constitute a bribery, the two are distinct acts and the law has always made a distinction between the person who gives the bribe and the person who accepts it and separate penalties are attached to each of the acts.

Having regard to the provisions of the Indian Penal Code relating to election offences and the legislative practice in England and India and having regard to the provisions of the Representation of the People Act, 1951, as it stood before the amendment in 1956 by Act XXVII of 1956, which treated the giving of bribes as a major corrupt practice and the acceptance of any bribe as a minor corrupt practice, it cannot be said that both the giving and the acceptance of bribe are put on a par and included in the term 'gift' in section 123 (1) (*a*) of the Act as it now stands after the amendment. Hence acceptance of bribe by a candidate from a returned candidate or his agent does not constitute by itself bribery as defined by section 123 (1) (*a*) of the Act and the candidate who is alleged to have accepted a bribe could not be deemed to have committed a corrupt practice within the meaning of section 123 of the Act and as such is not a necessary party to an election dispute within the meaning of section 82 (*b*) of the Act.

After the amendment of the Representation of the People Act by Act XXVII of 1956 an Election Tribunal has no longer any power to invoke the procedure under Order 1, rule 10, Civil Procedure Code and non-addition of necessary parties to an election petition as required by section 82, attracts the penal consequence of the rejection of the petition under section 90 (3) of the Act.

Jagan Nath v. *Jaswant Singh*, (1954) S.C.J. 257 : (1954) 1 M.L.J. 480 : (1954) S.C.R. 892 (S.C.) distinguished.

Petition under Article 226 of the Constitution of India, praying that in the circumstances stated therein, and in the affidavit filed therewith the High Court will be pleased to issue a writ of *certiorari* calling for the records relating to the order dated 5th August, 1957 and made in I.A. No. 1 of 1957 in R.P. No. 98 of 1957 on the file of the Election Tribunal, Tirunelveli and quash the said order.

S. Mohankumaramangalam, M. K. Nambiar, K. K. Venugopal and *V. M. Venugopala Menon* for Petitioner.

The Advocate-General (*V. K. Tiruvenkatachari*) and *T. Martin* for Respondents.

The Court made the following

ORDER :—*W. P. Nos.* 623, 624 *and* 799 *of* 1957.—These applications filed under Article 226 of the Constitution arose out of proceedings before the Election Tribunal, Tirunelveli, in Election Petition No. 98 of 1957, in which the validity of the election of S. B. Adityan was challenged. It should be convenient to refer to the parties as they have been arrayed in W. P. No. 623 of 1957 preferred by the returned candidate, Adityan.

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*W.P. Nos. 623, 624 and 799 of 1957. 1st November, 1957.

The petitioner (S. B. Adityan) and respondents 1 to 4 (S. Kandaswami, Athimuthu, Arunachalam and Ramayya) as well as Kosalram, Ahmed Sayeed, Meganathan and Muthu, nine in all, filed their nominations for the election to the State Assembly from Sattankulam Constituency of Tirunelveli district. Kosalram and Meganathan subsequently withdrew their nominations, and three others, respondent 4 (Ramayya), Muthu and Ahmed Sayeed retired from the contest. The petitioner and respondents 1 to 3 went to polls on 4th March, 1957, and on 6th March, 1957 and the petitioner was declared elected. The first respondent, Kandaswami, filed an election petition on 15th April, 1957, to avoid the election of the petitioner, Adityan. In that petition only four of the nominated candidates were impleaded as respondents. Among the candidates not impleaded were Muthu and Meganathan.

The averments in sub-paragraphs 2 and 4 of paragraph IV-A of the election petition filed by the first respondent were :

"IV-A (2).—Sri M. R. Meganathan was candidate for Sattankulam and Tiruchendur Assembly Constituencies at the election. The first respondent (S. B. Adityan) and his election agent paid him a gift of Rs. 10,000 to induce him to withdraw from being a candidate at the election from Sattankulam Constituency and in pursuance thereof Sri M.R. Meganathan withdrew his candidature at the election from Sattankulam Constituency".

* * * * * *

"(4) One Sri G. E. Muthu, a candidate at the election in this constituency, was paid a gratification of Rs. 5,000 by the first respondent (Sri S.B. Adityan) and his election agent for the purpose of making him retire from the contest and in pursuance thereof he retired from the contest".

The Representation of the People Act (XLIII of 1951) hereinafter referred to as the Act was amended to a considerable extent by Act (XXVII of 1956). Section 82 (*b*) of the Act so amended runs :

"A petitioner shall join as respondents to his petition

* * * * * *

(*b*) any other candidate against whom allegations of any corrupt practice are made in the petition".

The penalty for failure to comply with the requirements of section 82 (*b*) is the dismissal of the electon petition for which sections 85 and 90 (3) provide. The Election Commission had no occasion to decide whether the election petition was liable to be dismissed under section 85 of the Act. Before the Election Tribunal the petitioner filed I.A. No. 1 of 1957 for a direction to dismiss the election petition under section 90 (3) of the Act on the ground, that failure to implead Muthu and Meganathan, who were candidates against whom the election petitioner had alleged commission of corrupt practices, constituted a contravention of the mandatory provisions of section 82 (*b*). The first respondent, who was the election petitioner, opposed that application, and in his turn he filed I.A. No. 3 of 1957 to amend the election petition by impleading Muthu and Meganathan. The Tribunal dismissed both the applications.

The petitioner, the returned candidate, preferred W.P. No. 623 of 1957 for the issue of a writ of *certiorari* to set aside the order of the Tribunal in I.A. No. 1 of 1957, and also W. P. No. 624 of 1957 for the issue of prohibition to restrain the Tribunal from proceeding further with the enquiry into the election petition, which the petitioner alleged was liable to be dismissed under the mandatory provision of section 90 (3) of the Act.

Kandaswami, the election petitioner and the first respondent in W. P. Nos. 623 and 624 of 1957, preferred W.P. No. 799 of 1957 for the issue of a writ of *certiorari* to set aside the order of the Tribunal in I.A. No. 3 of 1957.

All the petitions were heard together with a view to dispose of them by a single order. As we have already pointed out, it should be convenient to refer to the parties as they were arrayed in W.P. No. 623 of 1957.

Did the failure of the first respondent to implead Muthu and Meganathan as respondents to the election petition constitute a contravention of section 82 (*b*)

of the Act was the question which the Tribunal had to decide. It arose for determination again in these proceedings before us. Muthu and Meganathan were certainly "candidates" as defined by section 79 (*b*) of the Act. They were candidates against whom also the first respondent made allegations in the election petition that he filed. What section 82 (*b*) further requires is that they must be allegations of corrupt practices committed by each of these two candidates, Muthu and Meganathan. In our opinion, the expression "any......candidate against whom allegations of any corrupt practice are made" is to be construed as "any candidate who is alleged to have committed corrupt practices." There is no scope for importing any concept of vicarious liability under section 82 (*b*) as it stands.

Apart from the allegations in the petition of what the petitioner and his election agent did, the allegation in paragraph IV-A (2) in effect, was that Meganathan accepted a gift of Rs. 10,000 and 'in pursuance thereof withdrew his candidature'. A similar allegation in paragraph IV-A (4) was to the effect, that Muthu accepted a gratification of Rs. 5,000 and "in pursuance thereof he retired from the contest". Did such acceptance constitute a "corrupt practice" as defined by the Act is therefore the real question for determination in these proceedings.

The definition of "corrupt practice" in section 2 (*c*) of the Act only takes us to section 123 (1) the relevant portion of which runs :

"The following shall be deemed to be corrupt practices for the purposes of this Act :—

(1) Bribery, that is to say, any gift, offer or promise by a candidate or his agent or by any other person, of any gratification to any person whomsoever, with the object, directly or indirectly of inducing,

(*a*) a person to stand or not to stand as or to withdraw from being a candidate or to retire from contest, at an election ;"

We shall omit sub-clause (*b*) and the *Explanation* to section 123 (1) as the terms thereof may not arise for consideration in these proceedings.

The first contention of Mr. Nambiar, the learned counsel for the petitioner, was that on the language of section 123 (1) (*a*) receipt of a bribe by a candidate who either withdrew his candidature or retired from the contest was as much a corrupt practice as the act of giving a bribe. The learned counsel urged that the giving and the acceptance of a gift constituted a single transaction. He referred to the observations of Lord Esher, M.R., in *Cochrane* v. *Moore*[1] :

"The proposition before the Court on a question of gift or not is—that the one gave and the other accepted. The transaction described in the proposition is a transaction begun and completed at once. It is a transaction consisting of two contemporaneous acts, which at once complete the transaction so that there is nothing more to be done by either party. The act done by the one is that he gives ; the act done by the other is that he accepts. These contemporaneous acts being done neither party has anything more to do. The one cannot give, acording to the ordinary meaning of the word, without giving ; the other cannot accept then and there such a giving without then and there receiving the thing given".

The further submission of the learned counsel for the petitioner was that when section 123 (1) (*a*) labelled bribery as such a corrupt practice and defined bribery to include any gift, the expression "gift" included both the giving of the gift and the acceptance of that gift.

The legislative practice in India, which followed to a considerable extent the legislative practice in England, in relation to the law of bribery as a corrupt practice at election by itself, compels the rejection of the construction of the expression "bribery" in section 123 (1) (*a*) of the Act for which Mr. Nambiar pleaded. Though giving and acceptance are necessary to constitute a gift and the gift itself is bribery, the law has always made a distinction between the person who gives the bribe and the person who accepts the bribe. They are distinct acts, they have always been treated as such, and separate penalties have been attached to each such act.

1. L.R. 25 Q.B.D. 57 at 75, 76.

The English Act of 1854 (17 and 18 Vic. C. II) dealt with a giver in sub-sections (1), (2) and (3) of section 2, and in sub-section (4) it dealt separately with the person who accepted the gift. So also did sub-sections (1) and (2) of section 3. In the Representation of People Act, 1949, (12 and 13 Geo. 6, Ch. 68) section 92 provided separately for the person who gave the gift and the person who received the gift. Section 92 ran:

"Any person who corruptly induces or procures any other person to withdraw from being a candidate at an election, in consideration of any payment or promise of payment, and any person withdrawing in pursuance of the inducement or procurement, shall be guilty of an illegal payment".

Section 99 of the English Act of 1949 defined the persons who were guilty of bribery with reference to a voter. Sub-sections (2) and (3) dealt with a person who gave, and sub-sections (5) and (6) dealt with a voter who received the gift.

With reference to section 25 of the Ballot Act (35 and 36, Vic., C. 33) Lord Coleridge, C.J., observed in *Malcolm* v. *Parry*: [1]

"It must be remembered that we are dealing with a state of the law which makes bribery complete so far as the bribe is concerned without acceptance of the bribe by the voter, and that a corrupt receipt of the bribe is a separate and independent offence".

The Indian Penal Code dealt with offences including offences relating to elections. Section 161, Indian Penal Code, provided for the punishment only of the person who accepted a bribe. The *Illustration* to section 109, Indian Penal Code, explained that a person who offered a bribe, abetted the commission of the offence defined in section 161, Indian Penal Code, the offence defined in section 161, Indian Penal Code, is only acceptance of the bribe. Section 171-B, Indian Penal Code, provided separately for the person who gave the bribe and for the person who accepted the bribe; each was guilty of bribery as defined by section 171-B, Indian Penal Code.

An even clearer light is thrown on the subject by the statutory changes in the Act, the Representation of the People Act (XLIII of 1951) made by the Amending Act (XXVII of 1956). As the Act stood before it was amended in 1956, corrupt practices, which included bribery were dealt with in sections 123 and 124. The classification was into major corrupt practices which were included in section 123 and minor corrupt practices which formed the subject-matter of section 124. Section 123 (1) (*a*) of the Act before amendment ran:

"The following shall be deemed to be corrupt practices for purposes of this Act:

(1) Bribery that is to say, any gift, offer or promise by a candidate or his agent or by any other person with the connivance of a candidate or his agent of any gratification to any person whomsoever with the object, directly or indirectly, of inducing—

(*a*) a person to stand or not to stand as, or to withdraw from being, a candidate at an election."

That constituted what was called a major corrupt practice. It should be fairly clear that what constituted a major corrupt practice under section 123 (1) (*a*) was the gift, offer or promise by a candidate or his agent, or by any other person with the connivance of a candidate or his agent. It was the act of giving by this class of persons that constituted a major corrupt practice. The act of giving was also dealt with, but as a minor corrupt practice, in section 124 (1) of the Act, when the giving was by a person who was not a candidate or his agent or a person acting with the connivance of a candidate or his agent. In both cases, the receipt was dealt with separately under section 124 (3) of the Act as a minor corrupt practice. The relevant portion of section 124 ran:

"The following shall be deemed to be corrupt practices for purposes of this Act—

* * * * * *

(3) the receipt or agreement to receive, any gratification whether as a motive or a reward—

(*a*) by a person for standing or not standing as, or for withdrawing from being, a candidate;"

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1. L.R. 9 C.P. page 610 at 616.

It should be noted that before the Act was amended in 1956, there was no distinction between withdrawing a nomination and retiring from the contest. Both were within the scope of the expression "withdrawing from being a candidate" in section 124 (3) (a). As the learned Advocate-General explained, the position before the Act was amended in 1956 was this. What could be called the "group of givers" of gifts was dealt with in sections 123 (1) and 124 (1) and consisted of (1) the candidate, (2) his agent, (3) any other person who made the gift with the connivance of the candidate or his agent, and (4) any other person who made the gift not included in the categories (1) to (3) mentioned above. The person who received the gift or bribe was dealt with separately in section 124 (3) of the Act as guilty of a minor corrupt practice. That made it clear that the person who accepted the bribe was not included within the scope of section 123 (1) or section 124 (1) of the Act. A gift must be by one person to another. The other person, that is the person who received the gift, was dealt with only under section 124 (3) of the Act. That section now stands repealed. We have already set out the provisions of section 123 (1) (a) as they were amended by Act XXVII of 1956. The noticeable changes are that the "giver group" has all been brought into section 123 (1) instead of being split up between section 123 (1) and section 124 (1) which was the position under the Act before it was amended. The expression "any other person" as it now stands in section 123(1) as amended includes the two classes dealt with separately in the unamended Act (1) any other person (who made the gift) with the connivance of a candidate or his agent—dealt with in section 123 (1) and (2) any other person who made the gift, dealt with in section 124 (1) of the amended Act. The further change is that section 123 (1) as it now stands amended dispensed with the requirement of connivance of a candidate or his agent for the gift by any person other than a candidate or his agent to constitute bribery. These changes, in our opinion, cannot enlarge the scope of section 123 (1) as it now stands to include within it both the giving and the acceptance of a bribe. When the Parliament repealed section 124 (3), which treated the acceptance of the bribe as something distinct from giving of a bribe and treated the acceptance of a bribe as only a minor corrupt practice, it is difficult to accept the proposition of Mr. Nambiar, that the Parliament intended to put the giving of a bribe and the acceptance of a bribe on a par and include both in the expression "gift" in section 123 (1) (a) of the Act as amended. It is certainly permissible in construing the scope of an amended provision of an Act to examine what the law was before it was amended. At the risk of repetition we have to point out that the law on the subject before it was amended in 1956 kept alive the distinction between a person who gave the gift and the person who received the gift. After the amendment when, the gift as such is defined as bribery, it seems to us to be clear that the Parliament intended only the giving of the gift to constitute bribery and a corrupt practice, and not the other aspect of the transaction, the acceptance of the gift.

We have already pointed out that connivance of a candidate or his election agent has been dispensed with in defining bribery as a corrupt practice in section 123 (1) (a) of the Act. But it is not every corrupt practice that is within the scope of section 100 (1) (b) of the Act, which alone governs the avoidance of the election of the returned candidate. The relevant portion of section 100(1) (b) runs :—

> " . . . . If the Tribunal is of opinion—
>
> * * * * * *
>
> (b) that any corrupt practice has been committed by a returned candidate or his election agent or by any other person with the consent of a returned candidate or his election agent;
>
> * * * * * *
>
> the Tribunal shall declare the election of the returned candidate to be void".

It is not necessary for us to examine in these proceedings the difference between connivance and consent. Section 100 (1) (b) does not enlarge the scope of the definition of bribery, which is to be found in section 123(1) (a). What section 100(1) (b) still requires is proof that a corrupt practice has been committed

by a returned candidate or his election agent or by any other person. If, as we have pointed out earlier, section 123 (1) (*a*) excludes the acceptance of a gift from the scope of bribery as defined by that sub-section, the provisions of section 100 (1) (*b*) cannot help the petitioner to establish that acceptance as such will constitute bribery as defined by the Act. We did not understand the learned counsel to put forward such a contention.

To sum up this portion of the case, we are clearly of the opinion that the acceptance of a bribe by a candidate from a returned candidate or his agent does not constitute by itself bribery as defined by section 123(1) (*a*) of the Act, and the candidate who accepted such a bribe did not commit a corrupt practice within the meaning of section 123 of the Act.

The next contention of the learned counsel for the petitioner was that section 82 (*b*), which referred to a candidate against whom any allegations of corrupt practice are made, would also include within its scope candidates against whom allegation of abetment of any corrupt practice are made. The learned counsel urged that even if acceptance of bribe did not by itself constitute a corrupt practice within the meaning of section 123 of the Act, acceptance of the bribe would constitute abetment of the giving of the bribe, and certainly a corrupt practice within the meaning of section 123 of the Act. It should be remembered that it was by way of illustration that section 109, Indian Penal Code explained that a person who gave the bribe was guilty of the offence punishable under section 161, Indian Penal Code that offence itself being the acceptance of a bribe. It is not necessary for us to pronounce any concluded opinion of ours on the question, whether acceptance of bribe would constitute abetment of the commission of a corrupt practice as defined by section 123 of the Act. The commission of an offence and the abetment of the commission of the offence are distinct legal concepts. When the law intends to punish a person for abetment of an offence, specific provision is made therefor. There is no such express provision in section 123 of the Act or in any other provision of the Act. Abetment as such, even if it is established, does not, in our opinion come within the scope of section 82(*b*) of the Act, which deals with only allegations of the commission of corrupt practices.

We have to consider next the third line of argument of the learned counsel for the petitioner. That was principally based on the language of section 99 of the Act. That deals with what is familiarly known as " naming ". The relevant portion of section 99(1) runs :

" At the time of making an order under section 98 the Tribunal shall also make an order :—

(*a*) where any charge is made in the petition of any corrupt practice having been committed at the election, recording—

(i) a finding whether any corrupt practice has or has not been proved to have been committed by, or with the consent of, any candidate or his agent at the election, and the nature of that corrupt practice ; and

(ii) the names of all persons, if any, who have been proved at the trial to have been guilty of any corrupt practice and the nature of that practice :

Provided that a person who is not a party to the petition shall not be named in the order under sub-clause (ii) of clause (*a*) unless—

(*a*) he has been given notice to appear before the Tribunal and to show cause why he should not be so named ; and

(*b*) if he appears in pursuance of the notice, he has been given an opportunity of cross-examining any witness who has already been examined by the Tribunal and has given evidence against him, of calling evidence, in his defence and of being heard."

Mr. Nambiar's arguments were as follows : Even if the giving of a gift alone constituted bribery and a corrupt practice, and the person who receives the bribe is not himself a person who committed a corrupt practice as defined by section 123 of the Act, the person who receives the bribe is one who by the very acceptance of that bribe gives his consent to the commission of the corrupt practice that is, to giving of the bribe. Muthu and Meganathan were alleged to have accepted bribes given by the returned candidate and his election agent. Muthu and Mega-

nathan were themselves candidates. The allegation was to the effect that they consented to the commission of the corrupt practice by the petitioner and his agent. Therefore, if the truth of the allegations be established, Muthu and Meganathan were persons liable to be named under the provisions of section 99 (1) of the Act. The finding could then be that a corrupt practice has been committed by the petitioner or his agent and or with the consent of Muthu and Meganathan. The use of the expression "any candidate" in section 99 (1) (*a*) (*i*) was sufficient to include Muthu and Meganathan. If there was such a liability to be named, the candidates in this case, Muthu and Meganathan, would come within the scope of section 82 (*b*) of the Act.

We are unable to accept the contention, that the liability to be named under section 99 of the Act is a test for determining either the scope of section 82 (*b*) or the scope of section 123 (1) (*a*) of the Act. We do not consider it necessary to decide the question, whether if the allegations made by the election petitioner, the first respondent in paragraphs IV (A) (2) and IV (A) (4) are proved to be true, Muthu and Meganathan are liable to be named under section 99 (1) of the Act. It should be remembered that section 99 does not require every person to be named to be added as a party to the election petition. The addition of parties is governed by the provisions of section 82 of the Act. We have already construed the expression in section 82 (*b*) to mean "any candidate who is alleged to have committed corrupt practices". Now if acceptance of bribe is not itself a corrupt practice, the allegation that Muthu and Meganathan accepted bribes would not amount to allegations against a candidate of corrupt practice within the meaning of section 82 (*b*) and we have already pointed out that section 100 (1) (*b*) should be confined to persons charged with having given a bribe and should not be extended to a person who received the bribe.

We find it a little difficult to accept the contention of Mr. Nambiar, that the Parliament which deliberately removed receipt of a bribe from the definition of corrupt practice, now embodied in section 123 of the Act, let in receipt of a bribe by a candidate alone under the provisions of section 99 (1) of the Act. What has to be proved under section 99 (1) is that the person has committed a corrupt practice. Section 99 (1) (*a*) (*i*) requires that a person should have been proved at the trial to have been guilty of a corrupt practice, that is, he should have committed that corrupt practice. If receipt of a bribe is not itself a corrupt practice, there is no question of Muthu and Meganathan themselves having committed a corrupt practice. Their consent to the commission of the corrupt practice by the petitioner or his agent by acceptance of the bribe could still expose, under the terms of section 99 (1) (*a*) (*i*), in the circumstances of this case only the petitioner and his agent who alone constituted what was characterised by the Advocate-General as the " group of givers ". We are unable to accept as a correct proposition of law the contention of Mr. Nambiar, that Muthu and Meganathan, who were candidates and with whose consent corrupt practices were committed by the petitioner or his agent, were themselves candidates against whom the allegations of corrupt practices were made in the election petition within the meaning of section 82 (*b*).

In our opinion the decision of the Tribunal, that failure to implead Muthu and Meganathan did not come within the mischief of section 82 (*b*) and therefore of section 90 (3) of the Act, is correct. The Tribunal was right in dismissing I.A. No. 1 of 1957. The *rule nisi* issued in each of the Writ Petitions Nos. 623 and 624 of 1957 will be discharged and the petitions will stand dismissed.

W.P. No. 799 of 1957 is directed to question the legality of the order of the Tribunal in rejecting I.A. No. 3 of 1957 preferred by Kandaswami, the election petitioner. In this petition he has prayed that if the Tribunal, should hold that Meganathan and Muthu were necessary parties to be impleaded in the election petition on a proper construction of section 82 (*b*) of the Act, the petitioner might be permitted to amend the petition by adding these persons as parties thereto. The Tribunal held that if these " candidates " were necessary parties the petition for amendment filed after the period of time prescribed by section 81 of the Act

was not maintainable by reason of the express provisions of section 90(3) of the Act.

Mr. Mohan Kumaramangalam, learned counsel for the petitioner, invited our attention to the decision of the Supreme Court in *Jagannath* v. *Jaswant Singh*[1], and sought to pursuade us that the law as there laid down still governed the powers of the Tribunal even after the amendments effected by Act XXVII of 1956. It is sufficient to refer to the headnote of the decision of the Supreme Court to appreciate the point decided in it. The headnote in the Supreme Court Reports reads :

> " (i) that non-compliance with the provisions of section 82 of the Representation of People Act, 1951 and the omission of a proper party from the list of respondents is not fatal and the Tribunal is entitled to deal with the matter in accordance with the rules of the Code of Civil Procedure which have been made expressly applicable ;
>
> (ii) that it is one of the rules of construction that a provision similar to the one in section 82 is not mandatory unless non-compliance with it is made penal."

The basis of this decision is to be found in the provisions contained in sections 85 and 90 (4) of the Representation of People Act, 1951 as it stood before the amendment. Section 85 dealt with the powers of the Election Commission and referred to the stage when an election petition was before it. It enacted that if the provisions of section 81, 83 or 117 were not complied with, the Election Commission should dismiss the petition. This was followed by a proviso, which we omit as not material for the present purpose. The proper parties to be impleaded in an election petition were specified in section 82. The Supreme Court, had, therefore, no difficulty in holding that on the terms of section 85 the Election Commission could not dismiss a petition for non-compliance with the terms of section 82 for failure to implead the necessary parties. Section 90 (4) related to the powers of an Election Tribunal after the petition was referred to it by the Election Commission. This provision read :

> "Notwithstanding anything contained in section 85, the Tribunal may dismiss an election petition which does not comply with the provisions of section 81, 83 or section 117".

Even before the Election Tribunal the failure to implead a necessary party did not attract the penal consequence of the rejection of the election petition, which the failure to comply with the provisions of sections 81, 83 and 117 involved. In the context of these provisions when section 90 (2) conferred on the Election Tribunal the powers of a civil Court and directed it to follow the procedure prescribed for the trial of suits under the Code of Civil Procedure, the Supreme Court had no difficulty in holding that the Election Tribunal was vested with the same powers to add parties as under Order 1, rule 10 of the Code of Civil Procedure.

The amendment of the Act in 1956, however, has changed the entire situation, rendering the decision in *Jagannath* v. *Jaswant Singh*[1], no longer applicable . Section 85 as now amended reads :

> " If the provisions of section 81 or section 82 or section 117 have not been complied with, the Election Commission shall dismiss the petition ",

so that section 82 is now brought within the scope of the penal provision.

In line with section 85, section 90 (3) which has replaced section 90 (4) enacts :

> " The Tribunal shall dismiss an election petition which does not comply with the provisions of section 81, section 82, or section 117, notwithstanding that it has not been dismissed by the Election Commissioner under section 85 ".

As the penal consequence of the rejection of the petition has been statutorily imposed for non-compliance with the provisions of section 82, it must now be held that the power of the Election Tribunal to invoke the procedure under Order 1, rule 10 of the Code of Civil Procedure can no longer apply. The order of the Tribunal was therefore right and cannot be interfered with. In view, however, of the Tribunal's finding that failure to implead Muthu and Meganathan did not

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1. (1954) S.C.J. 257 : (1954) 1 M.L.J. 257 : (1954) S.C.R. 892 (S.C.).

constitute any contravention of section 82 (*b*) of the Act, there was no need to implead them as party respondents, and the provisions of section 90 (3) could not, therefore, apply. The *rule nisi* issued in W.P. No. 799 of 1957 is discharged and the petition is dismissed.

There will, however, be no order as to costs in any of the Writ Petitions.

R.M. — *Petitions dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. P. RAJAGOPALAN, *Officiating Chief Justice* AND MR. JUSTICE RAJAGOPALA AYYANGAR.

R. Thangaraja Pandian .. *Appellant**

v.

Veeraraghava Iyengar .. *Respondent.*

Madras Estates (Abolition and Conversion into Ryotwari) Act (XXVI of 1948), *section* 42—*Estate taken over by Government—Inam grant of a portion of melwaram —Claim for share of compensation by inamdar—Creation of charge on the estate.*

Limitation Act (IX of 1908), *Article* 131—*Applicability and scope—Recovery of arrears of melwaram amount —Limitation.*

When the original inam was granted the land out of which the melwaram was to issue was specified only by extent and was not localised. Therefore the melwaram was to issue out of every portion of the land. This would constitute a charge on the estate and this charge remained unaffected by the later arrangement by which the melwaram was quantified.

A claim for the recovery of arrears of melwaram amount is a periodically recurring right and can be enforced within 12 years under Article 131 of the Limitation Act.

Article 131 of the Limitation Act applied not merely to a suit for a declaration of a right but it also governed the period of limitation for the recovery of the money under such right.

Zamorin of Calicut v. *Achutha Menon*, (1914) 26 M.L.J. 377: I.L.R. 38 Mad. 916: (F.B.), followed.

Punjab Province v. *Pandit Tara Chand*, (1947) 2 M.L.J. 389 (F.C.), distinguished.

Appeal against the Order of the Estate Abolition Tribunal, Madurai, dated 20th March, 1953 and made in O.P. No. 571 of 1952.

R. Viswanathan and *S. Gopalaratnam*, for Appellant.

R. Kesava Ayyangar and *K. Parasaran*, for Respondent.

The Judgment of the Court was delivered by

Rajagopala Ayyangar, J.—The estate of Panayur in Tirunelveli district was notified and taken over by Government under the provisions of the Estate Abolition Act XXVI of 1948, and advance compensation therefor totalling Rs. 14,940 was deposited with the Estates Abolition Tribunal, Madurai. Thereafter the respondent before us made a claim under section 42 for the payment to him of a sum of Rs. 5,383-10-0 out of the amount thus deposited. This claim has been upheld in part by the Tribunal, which has directed payment to the respondent of Rs. 945-7-2 to be made, and it is this decision of the Tribunal whose correctness is challenged in this appeal by the proprietor, the " principal landholder " of the estate.

The claim of the respondent preferred under section 42 numbered as O.P. No. 571 of 1952 was based on these facts.

" From time immemorial the mahajanas, the pangalis of the applicant were entitled to a melwaram of 6¼ kottahs of seed land as *dhitta manbam*, the respondent being entitled to 5 and 31/32 for his share."

In support of his case the respondent filed Exhibits A-1 to A-3. Exhibit A-1 was an extract from the register of inams of the village, in which it was stated that there was a mahajana inam which found a place from the *manibam* accounts starting with Fasli 1212. The extent of this inam was specified as 8 kottahs wet and 5 marakkals dry, which expressed in acres came to 24.2 acres wet and 25.01 dry. This document set out 17 individuals as then in enjoyment of the inam, noting one Sami Aiyan aged then 40 years being entitled to 5 and 31/32 shares with a remark that the total of the karais in the village was 33. It also made a note that

* S.T.A. No. 28 of 1955. 14th October, 1957.

in the neighbouring village of Vayali Kulam the then owners also possessed shares, which were set out. The respondent then went to state that the melwaram was subsequently quantified, and that as the representative of these inamdars, he was for his share entitled to the sum claimed.

It is now common ground that the land, which was the subject of this grant was not at the date of the grant or even inam settlement localised but was merely melwaram due on an 8 kottahs of land out of the total extent of lands in the village. At some date not now ascertainable the share of the melwaram payable to the inamdars was settled with the landholder at 26 kottahs, 20 marakkals and 2¼ padis of paddy.

The respondent claimed that there had been arrears in the payment of his share out of the 26 kottahs, etc., of paddy between Faslis 1351 to 1359, and made a claim for a sum of Rs. 1,769-9-0 as representing these arrears. The value of the future payments was computed at Rs. 3,614-10-0 that was claimed in the application under section 42.

There was no dispute regarding the existence of the inam; nor regarding the amount in paddy, which was substituted for the yearly melwaram payable in respect of these unlocalised lands.

The appellant raised four grounds in opposition to this claim: (1) That the compensation amount had been deposited with the Tribunal on 3rd July, 1951, and that the petition under section 42, O.P. No. 571 of 1952, which was filed on 29th June, 1952, was beyond the period of limitation prescribed by section 42 and was therefore barred; (2) That the respondent, Veeraraghava Iyengar had not established his identity as a representative of the original inamdar, Sami Aiyan, whose, successor in interest he claimed to be; (3) That in any event the claim to the arrears of payments for any period beyond 3 years was barred by limitation, and that the Tribunal could not allow the arrears for the 9 years claimed in the petition; (4) That the amount expressed in terms of money as that due for arrears was not based on a proper computation of the price of paddy at the relevant periods.

Along with O.P. No. 571 of 1952, the respondent filed an application to excuse the delay in his filing the petition. In the affidavit in support of it the respondent had stated that he was not aware of the precise date of the deposit, and that consequently the delay in filing the O.P. within the period of six months should be excused. The Tribunal, though it did not pass any reasoned order on this application, allowed it, and it must therefore be held that it was satisfied that the respondent had just cause for not filing his petition in time. We do not see any error on this head in the order of the Tribunal to be rectified in the appeal.

The next point was in relation to the identity of the respondent, Veeraraghava Iyengar as the successor-in-interest of Krishna Aiyan referred to in Exhibit A-1. The only ground urged for this before the Tribunal, and repeated before us also, was that whereas the respondent, was an Iyengar, the individual named in Exhibit A-1 was an Ayyar. The Tribunal has repelled this contention on the ground, that there are several communities among the brahmins where the suffixes Ayyar and Iyengar are indiscriminately used in the same family and this by itself was, therefore, no reason to reject the respondent's case. We are in entire agreement with this view, which we confirm from our own experience.

The third point was regarding the validity of the claim for any period beyond three years. The Tribunal allowed the claim for more than three years by holding that the payment of this melwaram constituted a charge on the estate. Learned counsel for the appellants strenuously contended that the Tribunal committed an error in so holding. The Tribunal referred to the decision of a Bench of this Court, *Krishnaiah* v. *Lodd Govinda Doss*[1], as authority for the view. It was there held by Varadachari and Pandurang Rao, JJ., that a suit for the recovery of Kavimera being a grant of a portion of the melwaram of a certain village in a zamindari was governed

1. (1937) 46 Mad. L.W. 358.

by Article 131 of the Limitation Act, as being a suit to establish a periodically recurring right, which could be enforced within a period of twelve years. The learned Judges, also held that the liability in that case constituted a charge on the zamindari estate.

Mr. Viswanatha Iyer, learned counsel for the appellant attacked both the points involved in that decision. First he said that the decision of the Full Bench in *Zamorin of Calicut* v. *Achutha Menon*[1], on the proper interpretation of scope of Article 131 of the Limitation Act which had been followed in *Krishnlah* v. *Lodd Govinda Doss*[2] was no longer good law by reason of a pronouncement of the Federal Court in *Punjab Province* v. *Pandit Tara Chand*[3]. Secondly it was urged that the payment in the present case could not constitute a charge on the entire estate. We are unable to uphold either of these objections. In *Zamorin of Calicut* v. *Achutha Menon*[1], a Full Bench of this Court held that Article 131 applied not merely to a suit merely for a declaration of the plaintiff's right but it also governed the period of limitation for the recovery of the sums due under such right. The learned Judges examined all the previous decisions, and held that the language used in Article 131 though not free from doubt, pointed to the conclusion that it covered both these matters, namely, the declaration as well as the recovery of the dues under the right so declared. White, C.J., who delivered the main opinion said :

"The question of the existence of the right is no doubt distinct from the question of the right to recover moneys if it is established that the right exists. It is, however, difficult to see why the period of limitation should not in both cases be the same, as it is in the case of a suit for a declaration of a right to maintenance and in a suit for arrears of maintenance. If the contention of the appellant is well founded there is no article which deals specifically with the period of limitation in the case of a suit to recover moneys due under an alleged periodically recurring right. There is force in the contention that the use of the word 'establish' and the fact that there is only one article in the case of a suit with reference to a periodically recurring right, and not two as in the case of suits based on an alleged right to maintenance (*see* Articles 128 and 129) indicate that the Legislature intended to deal with both classes of suits in Article 131."

This decision of a Full Bench has been followed in this Court ever since in numerous cases. The judgment of the Federal Court, which learned counsel urges has overruled this Full Bench decision, was in relation to a suit by a public servant for the recovery of the arrears of his salary. One of the contentions raised by Government was that this suit was barred. His Lordship Zafrullah Khan, J., who dealt with this point about limitation considered the applicability of various articles of the Limitation Act, which counsel on either side contended were relevant to such a case. Articles 115 and 102 were put forward on behalf of the Government. They were rejected as inapplicable for reasons, which are not material in the present context. Counsel for the public servant in that case urged two Articles as applicable, Articles 131 and 120. The Court held that the latter was the one more appropriate.

Dealing with Article 131 Zafrullah Khan, J., said :

"Article 131 applies to suits to establish a peroidically recurring right. The period of limitation provided by the Article is 12 years and begins to run when the plaintiff is first refused the enjoyment of the right. A claim to recover arrears of pay is manifestly not one to establish a periodically recurring right."

This last sentence is relied on as conflicting with the decision of this Court in *Zamorin of Calicut* v. *Achutha Menon*[1], and as in effect overruling it. We are wholly unable to accept this argument. We understand the sentence to mean no more than that a salary due to a public servant is not a periodically recurring right within Article 131. The attention of the Court was not drawn to the various decisions of the several High Courts as to the proper interpretation of the words in the first column of Article 131 and we cannot, therefore, hold that without any consideration of the difficulties involved in construing those words in a restricted sense, the Federal Court intended to overrule the long line of decisions of this Court on the topic.

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1. (1914) 26 M.L.J. 377 : I.L.R. 38 Mad. 916 (F.B.).
2. (1937) 46 Mad. L.W. 358.
3. (1947) 2 M.L.J. 389 (F.C.).

The next point urged before us was as to whether the respondent had a charge in respect of the payments due to the pangudars. When the original inam was granted, the land out of which the melwaram was to issue was specified only by extent and was not localised. Therefore, the only conclusion possible is that the melwaram was to issue out of every portion of the land in the estate. This would, therefore, have constituted a charge on the estate. Learned counsel, however, urged that when by reason of the later arrangement, the amount due for melwaram was quantified into 26 kottahs, etc., of paddy, it became transformed as it were into a rent due under a permanent lease, and that without any express provision therefor no charge for the rent would exist. We are unable to uphold this contention. The nature of the obligation imposed upon the holder of the estate recognised by the inam grant and confirmed at the inam settlement was not altered by reason of the substituted arrangement. The judgment in A.S. No. 230 of 1894, which was a previous proceeding in which certain pangudars successfully sued to recover the arrears of the amounts due to them give some indication as to the manner in which this fixation took place. The learned District Judge there remarked that the average for particular periods was taken as the basis, and this was fixed for the future without reference to good or bad seasons, the actual yield during any particular year being wholly ignored. This would, therefore, indicate that there was no basic change in the nature of the right of the pangalis or in the obligation of the proprietor, but only that instead of payments which might vary with the actual produce from the lands, this became fixed quantities of paddy. If as we hold, there was a charge under the terms of the inam settlement it follows that it remained unaffected by the quantification of the payments. In this connection some reliance was sought to be placed on the allegation in the petition, O.P. No. 571 of 1952, where the respondent had used the words 'permanent lease'. But in the context it is clear that he was merely trying to reproduce what he considered was the decision in the proceeding of 1892 to 1895 culminating in A.S. No. 230 of 1894 to which we have already referred. We have gone through the entirety of this judgment of the appellate Court, and there is no basis for the contention that the substituted arrangement partook of the nature of a permanent lease. In our opinion, the Tribunal was right in holding, that there was a charge on the estate for the payment of these sums.

The last point that remains to be dealt with is as regards the conversion into money of the respondent's share of the 26 kottahs, etc., of paddy. Learned counsel pointed out that the Tribunal committed an error in thinking that the appellant had in his statement put the price of paddy in the relevant years at Rs. 8 per kottah. Though there is justification for this complaint, it does not help the appellant. The Tribunal had directed the parties to file statements as to the price of paddy, and the respondent put it at Rs. 15 per kottah. If, as is now pointed out, the appellant did not suggest any figure as the price during the relevant period, it would be seen that the statement of the Tribunal, that the figure of Rs. 15 per kottah mentioned by the respondent stood uncontradicted, is correct.

There are no merits in this appeal, which fails and is dismissed with costs.

V.S. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE RAJAGOPALAN.

Madurai Municipality, by Commissioner .. *Petitioner**

v.

K. N. K. Jagannatha Ayyar .. *Respondent.*

Madras District Municipalities Act (V of 1920), section 354 (2)—Bar of civil suits—Scope and extent of—Municipal assessment based on proper enquiry—Correctness of the quantum of assessment—If could be questioned in Civil Court.

Civil Procedure Code (V of 1908), section 115—Revisional jurisdiction of High Court—Finding of fact by lower Court vitiated by wrong approach—Interference with.

Section 354 (2) of the Madras District Municipalities Act is intended to provide a real protection to the Chairman and Council of a Municipality that in cases where they have proceeded in the matter of assessment in accordance with the provisions of the Act no suit will lie against them even if their actual decision is wrong. The Civil Court is neither an appellate nor a revisional authority to determine the correct rental value on which an assessment could be made. An erroneous assessment by a municipality would not in itself amount to an arbitrary exercise of the statutory power, if in fact the enquiry as contemplated by the Act is held before the actual assessment.

Though the High Court will not disturb a finding of fact by the lower Court in exercise of its revisional jurisdiction, still where the finnding is based on a wrong approach to the relevant statutory provisions, the High Court could interfere under section 115, Civil Procedure Code.

Petition under section 115 of Act V of 1908 praying the High Court to revise the Decree of the Court of the Subordinate Judge of Madurai, dated 13th September, 1954 and passed in A.S. No. 244 of 1953, preferred against the Decree of the Court of the District Munsif of Madurai Taluk, dated 2nd September, 1953 and passed in O. S. No. 208 of 1953.

K. Veeraswami, for Petitioner.

M. S. Venkatarama Ayyar, for Respondent.

The Court delivered the following

JUDGMENT.—The respondent was the owner of the residential building No. 57, South Vadampokki Street, Madurai. The petitioner, the Madurai Municipality, was the tenant of that house till 1942, and the monthly rent was Rs. 60. Thereafter it was rented by the owner to one Krishnier, and the fair rent for that building was fixed at Rs. 47 a month by the Rent Controller. In 1949, the plaintiff himself obtained possession of the house for the occupation of his son. Subsequently on 16th July, 1951, the house was rented to Dr. Kaliappan. The respondent claimed that under the registered rent deed, the rent payable by the tenant Dr. Kaliappan was Rs. 75 a month. The municipal assessment of this building was Rs. 53-4-3 per half year, the annual rental value being taken as Rs. 526. For each of the half years in 1951-1952 the Commissioner of the Municipality proposed to enhance the assessment to Rs. 226-12-6 per half year, the annual value of the building being Rs. 2,240. That provisional assessment was confirmed by the Commissioner after notice to the respondent. The respondent appealed to the Municipal Council and reiterated his contention, that the monthly rental value was only Rs. 75 and that the assessment should be on that basis. The Municipal Council fixed a rental value of Rs. 120 per month and reduced the half-yearly assessment to Rs. 136. These amounts were apparently paid under protest.

The respondent instituted the suit, out of which this application arises, claiming a refund of Rs. 132-12-0, which represented the difference between the assessment as finally determined by the Municipal Council and assessment which according to the plaintiff, should have been fixed on the footing that the real rental value of the building was Rs. 75 a month. The plea of the defendant Municipality was that the suit was barred under the provisions of section 354 of the Madras District Municipalities Act.

* C.R.P. No. 94 of 1955. 8th July 1957.

The learned District Munsif upheld that defence and dismissed the suit. On appeal, the learned Subordinate Judge set aside the decree of the trial Court and decreed the plaintiff's claim. It is the correctness of the appellate judgment that the defendant-petitioner challenged by his application under section 115, Civil Procedure Code.

The learned Subordinate Judge correctly posed the question for determination in appeal :

"Whether the provisions of the District Municipalities Act have not in substance and effect been complied with."

The finding of the learned District Munsif was the enhancement of the tax on the suit property was not *ultra vires* and illegal which in effect meant that the provisions of the Act had been complied with, and therefore the ban imposed by section 354 (2) applied. That finding was not accepted by the learned Subordinate Judge. The learned Subordinate Judge recorded :

"I have therefore no doubt as to the assessment having been made capriciously without taking into consideration the materials placed by the plaintiff before the defendant and that therefore it is a case of non-compliance with the provisions of section 82 (2) of the Act in substance and effect and that section 354 (1) cannot therefore operate as a bar to the plaintiff coming forward with the suit."

The learned counsel for the respondent (Plaintiff) pointed out that it is the revisional jurisdiction under section 115, Civil Procedure Code, that has now been invoked. The learned counsel urged that the question, whether there has been substantial compliance with the Act, is one of fact, which has to be determined with reference to the particular circumstances of the case. That was what was laid down in *Municipal Council, Kakinada* v. *Standard Life Insurance Co.*[1], and reiterated in *Municipal Council, Kumbakonam* v. *Messrs. Ralli Brothers*[2]. The learned counsel therefore urged that even though the appellate Court differed on that question of fact from the trial Court, the finding of the appellate Court should not be disturbed in exercise of the revisional jurisdiction of this Court.

The contention of the learned counsel for the petitioner that though the question posed for determination by the learned Subordinate Judge was correct, the approach the learned Judge adopted in answering that question vitiated the finding, is in my opinion, well founded. It was certainly not the province of the Civil Court to decide on the material placed either before the statutory authorities or before the Court what was the correct rental value on the basis of which the assessment could be determined. The civil Court is neither an appellate nor revisional authority for that purpose. The learned counsel for the petitioner would appear to be well founded, when he urged that the learned appellate Judge's view, that the rent deed executed by Dr. Kaliappan, showing that the rent agreed upon was only Rs. 75 a month, should have determined the issue, and that the correct rental value should be taken only as Rs. 75 a month, really furnished the basis for his finding, that the revision of the assessment made by the statutory authorities was capricious, "without taking into consideration the materials placed by the plaintiff before the defendant".

In *Lakshmanan Chetti* v. *Municipal Council, Trichinopoly*[3], Reilly, J., in dealing with the contention that "no assessment which is incorrect does in substance and effect comply with the provisions of the Act—that an incorrect assessment has no legal basis", observed :

"If that argument is accepted, then section 354 (2) of the Act is no protection against a suit of any person who is not in complete agreement with the Municipal Council about the justice of his assessment. I have no doubt that the sub-section was intended to provide real protection to the Chairman and the Council and that its effect is that, when they have proceeded in the matter of assessment in accordance with the Act, no suit will lie against them even if their actual decision is wrong. A disappointed assessee certainly cannot escape the bar against his suit by describing the action of the Council or the Chairman as arbitrary or by using any other strong language".

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1. (1900) 10 M.L.J. 401 : I.L.R. 24 Mad. 205 at 213.
2. (1930) 61 M.L.J. 748 at 753.
3. A.I.R. 1928 Mad. 208.

The learned Subordinate Judge held, in effect, that there was no proper enquiry before the assessment was revised, and that vitiated the exercise of the statutory power of the Commissioner to revise the assessment and also the appellate power exercised by the Municipal Council. That there was an enquiry by the Commissioner after the issue of the notice to the plaintiff informing him of the proposal to revise the assessment was common ground. Further D.W. 1, the Revenue Officer, deposed :

"I was present when the Commissioner conducted the revision enquiry. P.W. 1's (Plaintiff's) son and his kariasthan were present for that enquiry. They had brought documents and receipts. But they showed only Rs. 75 as rent per mensem."

D.W. 1 deposed further that the Commissioner directed him as the Revenue Officer to conduct further enquiries, and that on that enquiry he came to know that the monthly rental collected by the plaintiff from Dr. Kaliappan was really Rs. 200. D.W. 1 also gave evidence of the scope of his other enquiries with reference to other houses in that locality. It is true that D.W. 1 did not make a written report to the Commissioner of his enquiry. Exhibit B-7 showed that the Commissioner had a discussion with the Revenue Officer before the Commissioner accepted the Revenue Officer's report to him, that the actual rental was Rs. 200. The learned District Munsif commented on the failure of the plaintiff to place on record the evidence of Dr. Kaliappan. The learned Subordinate Judge commented on the failure of the Revenue Officer. D.W. 1, to examine Dr. Kaliappan during his enquiry. The learned Subordinate Judge apparently overlooked the fact, that the correctness of the decision of the Commissioner was not real by the issue for determination before this Court, even assuming that it was open to the learned Subordinate Judge to examine meticulously the scope of the enquiry conducted by the Revenue Officer. It is also a little difficult to accept the final conclusion, that there was no proper enquiry. The statutory authority to conduct the enquiry was the Commissioner. The plaintiff had an opportunity to make his representations to the Commissioner. It was open to the Commissioner to make further enquires himself or to depute any of his subordinates to conduct the enquiry. The Revenue Officer conducted the enquiry and reported orally the results of his enquiry to the Commissioner. I am unable to understand how this is not substantial compliance with the requirement, that there must be an enquiry before the quantum of assessment is determined. To determine the quantum of assessment in this case, the quantum of the rent actually received had to be determined. The question at issue was not what was the possible or probable rental value of the building. The question at issue narrowed itself down to this : Was it Rs. 75 a month that the plaintiff actually got from his tenant Dr. Kaliappan which was the plaintiff's claim, or was it Rs. 200 a month that the plaintiff was in actual receipt of as rent, which was the case put forward by the Revenue Officer . The quantum of evidence necessary to support the final conclusion, that Rs. 200 was the actual rent that the plaintiff received, was a matter for the statutory authority to decide. As I said, the evidence disclosed that there was an enquiry before the Commissioner discharged his statutory duty to determine the quantum of assessment. That the Revenue Officer did not make a written report in no way affected the real question, did the Commissioner as the statutory authority substantially comply with the requirements of law.

The learned Subordinate Judge referred to section 82 (2) of the District Municipalities Act. I fail to see how that really affected the question at issue. As I said, the question even before the Commissioner had narrowed itself to: Was it Rs. 75 or Rs. 200 that the plaintiff actually received as rent for the building ?

Even if the Commissioner had arrived at an erroneous decision, the proper forum for redress was the Municipal Council to whom an appeal lay. The plaintiff availed himself of that right and appealed to the Municipal Council. The Municipal Council came to the conclusion that Rs. 120 a month was the real rental value of the building. The learned Subordinate Judge observed :

"It must be either a case of the plaintiff getting a rent of Rs. 75 as contended by him, or a case of Rs. 200 being received by him as rent as contended by the defendant. I do not see how, in between the two, the rental has been fixed at Rs. 344, under Exhibit B-11."

It was certainly within the jurisdiction of the statutory authority, the Municipal Council, as the appellate authority, to fix on the material placed before it the quantum of the actual rent received. To limit the jurisdiction of the Municipal Council to a choice between Rs. 75 and Rs. 200 is certainly to misconstrue the scope of the jurisdiction vested in the Municipal Council as the appellate authority. Again, even if the conclusion of the Municipal Council that Rs. 120 was the actual rent realised by the plaintiff was erroneous, that was not open to correction by a civil Court. As I said it was not the duty of the Civil Court to determine what was the assessment that could be lawfully levied or to decide as incidental thereto what was the actual rent the plaintiff received.

There is one other feature I have to notice. Even if the plaintiff's grievance was that there had been no proper enquiry either by the Revenue Officer or by the Commissioner that could have been redressed when he appealed to the Municipal Council. It is a little difficult to say on the material on record that the plaintiff had not a full opportunity of making his representations to the appellate authority, the Municipal Council. Whether in disposing of the appeal the Municipal Council substantially complied with the requirements of law was the real question, and that question could only be answered in the affirmative. The learned counsel for the respondent urged that the erroneous finding of the Commissioner, without a proper enquiry by the Revenue Officer, vitiated the exercise of the appellate power of the Municipal Council. I am unable to accept that contention. It is only presenting again the same unacceptable argument, that an erroneous decision by the Municipality would amount to an arbitrary exercise of the power vested in the Municipality.

The learned counsel for the respondent referred to *Narayan Chandra Dutt* v. *Chairman, Municipal Commissioners, Panipat*[1]. That can have no application to the facts in issue in the present case. As I said, the real question was, what was the rent actually received by the plaintiff. The plaintiff claimed it was Rs. 75; the Commissioner was of the view it was Rs. 200; the Municipality took the view it was Rs. 120.

In determining the respective spheres of the civil Court and the statutory authority it is well to bear in mind the principle laid down by Varadachariar, J., in *Secretary of State* v, *Meyappa*[2].

> "Statutory tribunal or authority which has to arrive at a decision as to the existence or non-existence of certain facts before proceeding to take further action under the statute, is acting within the jurisdiction in making that decision even though wrongly and is immune from civil proceedings to quash that decision except such as are prescribed by the statute".

It was the statutory authority that had to decide first what was the actual rental received, and on the basis of that fix the assessment payable by the owner of the house.

Since the finding of the learned Subordinate Judge, that there had been no substantial compliance with the requirements of the Act, was vitiated by his wrong approach to the problem, I am constrained to differ from him and accept the conclusion of the learned trial Judge, that there had been a real compliance.

The decree of the learned Subordinate Judge is set aside and the petitioner will be entitled to his costs both in this Court and in the lower appellate Court.

Petition allowed.

R.M.

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1. I.L.R. 57 Cal. 162=A.I.R. 1930 Cal. 38.
2. I.L.R. (1937) Mad. 211 : A.I.R. 1937 Mad. 241.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE RAMASWAMI.

P. D. Viswanatha Reddiar's estate by P. D. Narayayana-swami Reddiar .. *Petitioner**

v.

K. Dhanraj Sowcar .. *Respondent.*

Madras Buildings (Lease and Rent Control) Act (XXV of 1949), section 12-B—Revisional powers—Scope of—Interference—Grounds—Application for eviction on grounds of wilful default of tenant in payment of rent and on ground of bona fide *requirement of landlord for own occupation—Concurrent finding of wilful default by Rent Controller and Appellate Authority and order of eviction—District Judge setting aside order and remanding case for fresh disposal on grounds that the second ground also should have been gone into—Propriety and legality of remand—Civil Procedure Code (V of 1908), section 115—Scope —Remand—Discretion—Exercise of—Principles.*

The powers of revision under section 12-B of the Madras Buildings (Lease and Rent Control) Act, 1949, are intended to be exercised with a view to subserve and not to defeat the ends of justice Where substantial justice has been rendered, the revisional Court should not interfere, merely because it has jurisdiction to do so, and that if the revisional Court had tried the case, it would have come to a different conclusion. There can be no interference with findings of fact unless such findings have been reached by a consideration of irrelevant or inadmissible evidence or they are so perverse that no reasonable person could have reached such a conclusion. There can be no interference on questions of law unless any provision of law has been misconstrued or there is an erroneous understanding of the law applicable to the matter. These principles apply both to the High Court and to the District Court.

Case-law reviewed.

Where, in an application for eviction on the ground of wilful default in payment of rent and on the ground of *bona fide* requirement of the landlord for his own occupation, both the Rent Controller and the Appellate Authority under the Rent Control Act found that the tenant was guilty of wilful default in the payment of rent and ordered his eviction on that ground alone, but the District Judge, in revision without applying his mind at all to that question, set aside the concurrent orders and remanded the matter for fresh disposal to the Rent Controller, holding that the application should have been disposed of also on the other ground put forward :

Held, that the remand order was thoroughly improper. Where the parties have been content to get the eviction matter disposed of on one of the two grounds put forward, and the decision of one of which was sufficient for the disposal of the matter, the remand must be held to be improper and unsustainable. Remand is an exercise of judicial discretion which cannot be abdicated or rested on the half-hearted acquiescence of the parties who might not be averse to a remand lest worse might befall them.

Petition under section 115 of Act V of 1908 praying the High Court to revise the Order of the District Court of Chingleput, dated 5th December, 1956 and made in Civil Revision Petition No. 95 of 1956 preferred against the Order in C.M.A. No. 8 of 1956 on the file of the Court of the Subordinate Judge of Chingleput preferred against the Order of the Rent Controller, Chingleput, in R.C.P. No. 55 of 1954.

L. V. Krishnaswami Ayyar, for Petitioner.

P. Kothandaraman, for Respondent.

The Court delivered the following

JUDGMENT.—This is a revision petition filed against the order of remand made by the learned District Judge of Chingleput in regard to the concurrent order of eviction made by the Rent Controller, Chingleput, and the appellate authority, the learned Subordinate Judge of Chingleput under the Madras Buildings (Lease and Rent Control) Act.

The facts are : The petitioner, landlord, before me, filed an application before the Rent Controller for eviction of the respondent, tenant, from his house on the two grounds permissible under the Act cited above, *viz.*, wilful default in payment of rent and that he (landlord) required the premises for his *bona fide* occupation. The tenant could be evicted under either of these grounds. Both the Rent Controller and the Appellate Authority found that the tenant was plainly guilty of wilful default in the payment of rent, Therefore, they ordered eviction of the tenant. In the revision provided under section 12-B of Act, *viz.*, empowering the

*C.R.P. No. 507 of 1957. 17th July, 1957.

District Judge to call for and examine the records relating to any order or proceeding under this Act for the purpose of satisfying himself as to the legality or propriety of such order or proceeding, the learned District Judge, without applying his mind at all to the question whether the eviction ordered on the ground of wilful default was illegal or irregular or improper, set aside the orders of the lower Courts and remanded the matter for fresh disposal by the Rent Controller, in the light of the observations made by him, *viz.*, that the application should have been disposed of also on the other ground for eviction raised but not gone into because the ground of wilful default was sufficient for disposal of the eviction petition. Thereupon the present revision petition has been preferred to this Court.

The scope of revisional powers under this Act have been the subject-matter of repeated decisions the substance of which is that in revision it would not be proper for the revisional Court to substitute its own appreciation of the evidence in place of that of the Court below. The mere fact that if it had tried the case it would have come to a different conclusion on the facts would be no ground for interference with a finding of fact. The distinction between revision and appeal must be maintained and revisional proceedings should not be converted into an appeal. There can be no interference with findings of fact unless the finding has been reached by a consideration of irrelevant or inadmissible matter or it is so perverse that no reasonable person could have reached that conclusion. Unless there is something palpably wrong with the finding of facts which is backed by evidence a revisional Court should not interfere with it. There can be no interference on questions of law unless any provision has been misconstrued or there is an erroneous understanding of the law applicable to the matter. The powers under section 12-B are intended to be exercised with a view to subserve and not defeat the ends of justice. Where, therefore, substantial justice has been rendered, the revisional Court will not interfere merely because it has jurisdiction to do so. These principles apply *mutatis mutandis* to the District Judge and High Court. The revisional powers, though wide, are discretionary and have got to be exercised not as a matter of course, but only in the interests of justice. It is not obligatory on the District Judge in every case when an application is made to it under section 12-B (1) to call for the records. It is not necessary that in every case arising under section 12-B (1) the District Judge must record his reasons for declining to interfere in revision; *Balasubramania Pillai* v. *Govindarajulu Naidu*[1], *Shambagavalli* v. *Dana Lakshmi*[2], In re *Murugayya Pillai*[3]. *Krishnaveni Ammal* v. *Danushkoti Nadar*[4], *Sasiwarana Thevar* v. *Ponnu*[5], (Grounds of interference by the Revisional authority restated by Rajamannar, C.J.: *Sasivarna Thevar* v. *Ponnu*[5]. See *Kapa Kasi Viswanathan* v. *B. Madan Singh*[6], *Sivakali Goswami* v. *Emperor*[7], *Algoo Misir* v. *Rex*[8]. See also R. Mathrubutham and R. Srinivasan's The Madras Buildings (Lease and Rent Control) Act, 1949, (M.L.J.)(1955) Edn. at pp. 177-178.

Bearing these principles in mind if we examine the facts of this case, we find that the remand ordered by the learned District Judge is thoroughly improper. The parties have been content to get the eviction matter disposed of on one of the two grounds put forward and the decision of one of which was sufficient for the disposal of the controversy. The Rent Controller in the last paragraph of his order states:

> "I therefore consider that the respondent has been guilty of wilful default in payment of rent to the petitioner, who is consequently entitled to an order of eviction. That being so, I do not think it is necessary for me to go into the second ground of application, *viz.*, petitioner's requirement for the suit shop for the use of the estate."

The learned Appellate Authority, in paragraph 3 of his judgment, states:

> "The lower Court has not given a finding as regards the question whether the premises was required for the use of the petitioner and no arguments were also advanced before me in that respect. Therefore, I do not give any finding on this point."

1. (1955) 2 M.L.J. (N.R.C.) page 3.
2. (1933) 2 M.L.J. (N.R.C.) page 21.
3. (1954) 2 M.L.J. 59.
4. (C.R.P. No. 1241 of 1955) (1956) 2 M.L.J. (N.R.C.) page 57.
5. (1957) 1 M.L.J. 158.
6. (1948) 1 M.L.J. 223.
7. (1944) A.L.J. 419.
8. (1949) 4 D.L.R. (All.) 264.

In these circumstances the remand was improper and is not sustainable. When such is the case the fact that even the parties were not averse to a remand, lest probably worse might befall them, is no ground for a remand. Remand is an exercise of judicial discretion by the learned District Judge which cannot be abdicated, and in regard to which there can be no judicial self-abnegation and rested on the half-hearted acquiescence of the parties who might be fearful that if they appeared unduly obstructive to what the learned District Judge was thinking to be a proper course, worse might befall them.

In the result, the revision is allowed and in the circumstances without costs. The orders of the lower Court and the appellate Sub-Court are restored.

P.R.N. ——— *Revision allowed.*

HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE RAMASWAMI.

O. Ramadoss .. *Appellant**

v.

R. Sanhasi Chettiar and others .. *Respondents.*

Malicious prosecution—What amounts to—Foundation of action for damages—Onus of proof—Factors to be proved in a suit for damages for malicious prosecution.

The foundation of an action for malicious prosecution lies in abuse of the process of Court by wrongfully setting the law in motion and it is designed to discourage the perversion of the machinery of justice for an improper purpose. Since public policy encourages exposure of crime, actions for damages for malicious prosecution are viewed strictly by Courts and the burden of proof is very heavy on the plaintiff.

Before a plaintiff can succeed in an action for damages for malicious prosecution, it should be established that—(*a*) the defendant *prosecuted* the plaintiff; (*b*) the prosecution has ended in favour of the plaintiff ; (*c*) the prosecution was without *reasonable or probable cause* ; (*d*) the defendant was actuated by *malice* ; and (*e*) the plaintiff has suffered special damages or the proceedings are such that in their very nature are calculated to injure his honour or credit. If any one of these elements is lacking the plaintiff cannot succeed in the action. Though the term ' prosecution ' for purposes of the tort of malicious prosecution is not restricted to prosecutions in the strict sense known to the Code of Criminal Procedure, still it involves an element of criminality and a person can be held liable for malicious prosecution only if he is the proximate and effective cause of putting the law in motion. A mere informant to the police or a witness cannot be sued for malicious prosecution.

Appeal against the Decree of the Court of the Subordinate Judge of Dindigul in Appeal Suit No. 8 of 1954, preferred against the Decree of the Court of the District Munsif of Periyakulam in Original Suit No. 536 of 1952.

T. P. Gopalakrishnan, for Appellant.

P. S. Chandrasekharan and *P. S. Ramachandran*, for Respondents.

The Court delivered the following

JUDGMENT.—This is a second appeal preferred against the decree and judgment of the learned Subordinate Judge of Dindigul in A.S. No. 8 of 1954, confirming the decree and judgment of the learned District Munsif of Periakulam in O.S. No. 536 of 1932.

The facts are : In Thevaram in Madurai District there is a Cardamom Planters Co-operative Bank Ltd. It is managed by an elected directorate through its President. It is the duty of the President to supervise all matters connected with the bank. He is also the treasurer and is in charge of all the properties of the bank.

This bank has for a long time been subscribing and getting newspapers for the use of the staff and its members. These when accumulated are sold and the proceeds credited in the bank's accounts. There is no dispute that 4 or 5 days prior to 26th January, 1950, Independence Day, the appellant Ramadoss as the then President of the Bank sold all accumulated newspapers, tins, gunny bags, used-up ink-jars, etc., for Rs. 50 to Pavuna Chettiar, Ayyathambi Nadar, Natarajan Chettiar

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*S.A. No. 207 of 1955. 27th September, 1957.

and others of Thevaram at the bank premises and got the amount from the purchasers. The amount has not been brought to the credit of the bank in the accounts.

There had already been ill-feelings between this Ramadoss and some others. Therefore, this matter was seized upon with avidity by the opponents of Ramadoss. Thereupon a reference was made to the Deputy Registrar of Co-operative Societies and lawyers including a Barrister were consulted and legal opinion taken and the General Body authorised a complaint being preferred against Ramadoss for misappropriation.

On the foot of these prior proceedings a complaint was filed in C.C. No. 36 of 1951 and disposed of by the Additional First Class Magistrate (II), Madurai. Before the Magistrate seven witnesses were examined on behalf of the prosecution who established that Ramadoss sold old newspapers, old tins, empty ink jars, gunnies and a wooden rack belonging to the Bank and did not bring the sale proceeds to the cash account of the Bank. But Ramadoss contended that the articles disposed of belonged to certain defunct institutions which had been earlier located in the same building and that the amount realized was set-off against a portion of the white-washing expenses of the Bank building preparatory to the celebration of the Independence Day. The learned Magistrate concluded that on the materials there was no satisfactory and dependable evidence to find that the properties sold by the accused Ramadoss belonged to the Bank or that the accused misappropriated the sale proceeds for himself and discharged the accused under section 253 (1), Criminal Procedure Code.

Ramadoss thereupon filed a suit for damages for Rs. 2,000, for malicious prosecution. Both the Courts below came to the conclusion that the defendants had reasonable and probable cause far launching the prosecution against the plaintiff and so the plaintiff was not entitled to any damages. Therefore the suit was dismissed. Hence this second appeal by the defeated Ramadoss.

The action for damages for malicious prosecution is part of the Common Law of England. In India as in other parts of the Commonwealth like Australia the law on the subject is exactly the same as the law in England and the United States of America.

For a comparative study of malicious legal proceedings under the three systems *see* Chapter XXII page 850 and foll. of Clerk and Lindsell on Torts, Eleventh Edition (1954), Chapter XXV, page 849 and foll. of Anand and Sastri, Law of Torts (1952), Restatement of the Law of Torts as adopted and promulgated by the American Law Institute at Washington, D.C., Vol. III, Ch. XXIX, page 379, foll. and J. C. Fleming, The Law of Torts (1957) (The Law Book Co. of Australasia Pty. Ltd., Ch. XXIV, pages 618-636).

The foundation of the action lies in abuse of the process of the Court by wrongfully setting the law in motion and it is designed to discourage the perversion of the machinery of the justice for an improper purpose. The gist of the action as 34 American Jurisprudence, page 703, puts it is the putting of legal process in force, regularly for the mere purpose of vaxation or injury, or as 38 Corpus Juris puts it the gist of the action is that plaintiff has been improperly made the subject of legal process resulting in his damage (page 383).

Professor Winfield in his well-known work on Law of Torts narrates the long history of this tort taking us back to the old writ of conspiracy *de odio et atia* which was in existence as early as Edward I's reign and how its progress towards its modern equivalent had to make way slowly between two competing principles, *viz.*, the freedom of action that every man should have in bringing criminals to justice and the necessity for checking lying accusations of innocent people. (4th edition (1948) pages 610-611).

Thus malicious prosecution a very ancient action, regarded as a remedy is a distinctive action *ex delicto* for the recovery of damage to person, property or reputation shown to have proximately resulted from a previous civil or criminal proceeding which was commenced or continued without probable cause but with malice and which has terminated unsuccessfully (38 Corpus Juris, page 383).

It was only in 1698 that this action for damages for malicious prosecution was placed on a firm basis in *Savile or Savill* v. *Roberts*[1], and Professor Winfield concludes this historical exposition by pointing out that even then it has become so much hedged about with restrictions and the burden of proof upon the plaintiff is so heavy that no honest prosecutor is ever likely to be deterred by it from doing his duty, and it is notable how rarely an action is brought at all much less a successful one, for this tort. Therefore to cite 34 American Jurisprudence, page 705, again it is frequently said that the action for malicious prosecution is not favoured in law but a better way of expressing the idea is to say that the action should be properly guarded and its true principles strictly adhered to since public policy favours the exposure of a crime which a recovery against a prosecutor obviously tends to discourage. Harper on Torts, U.S.A., Chapter XVI, page 581 : It is highly desirable that those reasonably suspected of crime be subjected to the process of criminal law for the protection of society. It is unnecessary that the citizen be accorded immunity for *bona fide* efforts to bring anti-social members of society to the bar of justice. Again it is necessary that one individual be free to protect his own personal rights by resort to the Courts without the threat of a counter suit for damages in the event he is unsuccessful. All the restricts resulting from these various interests and principles of social policy are reflected in the usual formula for the tort of malicious prosecution that the plaintiff must show (*a*) that proceedings had been instituted against him (*b*) for an offence which was groundless as evidenced by the successful termination of the proceedings in his favour and (*c*) which were instituted against him by the defendant without probable cause and from malicious motives.

In a suit for damages for malicious prosecution the plaintiff has to prove as laid down by their Lordships of the Privy Countil in *Mohammed Amin* v. *Jogendra Kumar Bannerjee*[2], that the defendant has prosecuted the plaintiff, *i.e.*, instituted criminal proceedings or certain other proceedings reflecting upon the plaintiff's honour or character (2) that the prosecution has ended in favour of the plaintiff; (3) that the defendant has prosecuted without reasonable and probable cause; (4) that the defendant in prosecuting was actuated by malice, *i.e.*, an indirect and improper motive ; and (5) that the plaintiff when the proceedings are other than criminal proceedings has suffered special damage, unless the proceedings are such as from their very nature are calculated to injure the credit or honour of the plaintiff. To sum up in the language of 34 American Jurisprudence, page 703, a malicious prosecution is one that is begun in malice without probable cause to believe it can succeed and finally ends in failure. If any one of these elements is lacking the result is fatal to the action. (Indian) Anand and Sastri Law of Torts, page 850; Ramaswami Iyer, The Law of Torts, Fourth Edition, page 317; Venkatesa Iyer, Law of Torts, page 498; (English) Clerk and Lindsell on Torts, Eleventh Edition, page 582; Salmond on Torts, Eleventh Edition, page 789; Underhill's Law of Torts, 15th Edition, page 276, *et seq*; (American) Restatement of the Law: Torts, Volume III, section 653, page 392; 34 American Jurisprudence Malicious Prosecution, S.I., page 703 and foll.; 38 Corpus Juris, page 386, S. 3; Fleming, page 619 (Australian).

The term " prosecution " will normally mean criminal proceedings in general. But for the purpose of the tort of malicious prosecution, it includes all criminal proceedings to which any moral obloquy is attached. The word " prosecution " in the phrase " malicious prosecution " is not to be taken in the restricted sense in which it is used in the Code of Criminal Procedure. It is not essential that the original proceeding should have been of such a nature as to render a person against whom it is taken liable to be arrested, fined or imprisoned. Thus, proceedings under section 476 of the Code of Criminal Procedure and proceedings under section 13 of the Legal Practitioners Act would constitute a prosecution within the meaning of the Law of Tort. The prosecution must, however, as pointed out in Pollock on Torts, Fourteenth Edition, at page 249, have been for an offence of which a conviction would carry reprobation impairing the party's fair name. It is not enough that

1. (1698) 1 Ld. Raym. 374: 1 Salkeld 14: Carthew 416: 12 Mod. 208: 5 Mod. 223: 91 E.R. 14.
2. (1947) 2 M.L.J. 27 : I.L.R. (1948) 1 Cal. 256 : L.R. 74 I.A. 193 : A.I.R. 1947 P.C. 108 (P.C.).

the proceedings were penal in form as is the case under many administrative statutes. *Wiffen* v. *Bailey*[1], *Sreeramulu* v. *Kolandaivelu*[2].

In order to entitle a plaintiff to succeed in a suit for damages for malicious prosecution, the first essential to be established by him is that there was prosecution of the plaintiff by the defendant. A prosecutor has been described as a man actively instrumental in putting the law in force. A person would be a prosecutor where he files the complaint himself or has it filed through the instrumentality of an agent or a counsel. A private person at whose instance and report the prosecution is launched by the police is a prosecutor within the meaning of the present context: *Gaya Prasad* v. *Bhagat*[3]. But the case would be otherwise, where the defendant merely gave an account of his honest suspicion about the plaintiff to the police, who without any further activity on his part had started a case against the plaintiff. Thus a mere informant cannot be a prosecutor. There is a sharp distinction between giving information and making complaint upon which prosecution is based. The question whether the defendant was the real prosecutor or informant is to be determined by his conduct before and during the trial. *Periya Goundan* v. *Kuppa Goundan*[4], *Manickam* v. *Munuswami*[5], *Rajagopal* v. *Spencer & Co.*,[6], *Shanmuga* v. *Kandaswami*[7]. To render one liable for malicious prosecution it must appear that he was the proximate and efficient cause or instigated " or was " actively instrumental as Fleming puts it, in putting the law in motion; some affirmative act or procuration in connection with the prosecution must be shown: *Damby's Case*[8]. Therefore witnesses cannot be sued for damages: *Fakir Mohammed* v. *Fakir Nanji*[9], *Shanmuga* v. *Kandaswami*[7]; *Cabasi* v. *Vila*[10] (distinction: Witnesses are not " self-starters "). For the purpose of a suit for damages for malicious prosecution, the prosecution cannot be said to have commenced unless and until a process has been issued for the plaintiff to appear; *Sheik Meeran* v. *Ratnavelu*[11], *Arunachaala* v. *Chinna Muniswami*[12], *Vattappa Kone* v. *Kuttu Karuppan*[13], *Sanjivi* v. *Koneri*[14]. Their Lordships of the Privy Council in *Muhammad Amin* v. *Jogendra*[15], have laid down a different test, *viz*., whether criminal proceedings have reached a stage at which damage to the plaintiff results; *See also* (Indian) Anand and Sastri Law of Torts, page 850; Ramaswami Iyer, Law of Torts, Fourth Edition, page 319; K. G. Kale, the Law of Malicious Prosecution (1930), page 8; Mitter, Defamation and Malicious Prosecution (1954), Part I, Chapter II, page 202 and following; Venkatesa Iyer, Law of Torts (1935), Chapter XXI, page 498 and following, D. N. Guha, Defamation and Malicious Prosecution, page 101 and following; (English) Clerk and Lindsell on Torts, Eleventh Edition, page 852; Salmond on Torts, Eleventh Edition, page 740; (American) 34 American Jurisprudence, sections 22-26, pages 715 and following; Restatement of Law: Torts, Volume III, Chapter XXIX, section 654, page 389; 38 Corpus Juris, section 22, page 394 and following; Fleming, pages 621-622 (Australian).

In order to succeed in a suit for malicious prosecution, the second essential is that the plaintiff must establish that his prosecution by the defendant ended in his favour. The reason for this proposition is that if in the proceeding complained of the decision was against the plaintiff and was unreversed, it would not be consistent with the principle on which the law is administered, for another Court, not being the Court of Appeal, to hold that the decision was come to without reasonable and probable cause. The word " ended " is the operative word. If the plaintiff was convicted, and the conviction was quashed on appeal, he can still sue as the proceedings ended in his favour. Where the plaintiff is convicted of an offence similar to, but less grave than the offence with which he was charged by the defendant, the defendant may still be liable for malicious prosecution of the graver offence. A

1. L.R. (1915) 1 K.B. 600.
2. (1916) 37 I.C. 374 (Mad.).
3. (1908) 18 M.L.J. 394: L.R. 35 I.A. 189: I.L.R. 30 All. 525 (P.C.).
4. (1919) 37 M.L.J. 234: I.L.R. 42 Mad. 880.
5. (1915) 29 M.L.J. 694.
6. (1920) 12 L.W. 87.
7. (1920) 12 L.W. 170.
8. 43 L.T. 603.
9. A.I.R. 1932 Sind 23.
10. (1940) C.L.R. 130.
11. (1912) 25 M.L.J. 1: I.L.R. 37 Mad. 181.
12. 1926 M.W.N. 527.
13. (1941) M.L.J. 200.
14. (1925) 50 M.L.J. 460: I.L.R. 49 Mad. 315.
15. (1947) 2 M.L.J. 27: 51 C.W.N. 723: L.R. 74 I.A. 193 (P.C.).

prosecution may end favourably not only by acquittal but also and favourably by discharge, discontinuance of the proceedings excepting where it is due to the impossibility or impracticability of bringing the accused to trial or dismissal of the complaint: (Indian) Anand and Sastri Law of Torts (1952), page 857; Ramaswami Iyer, The Law of Torts, Fourth Edition, page 320; Venkatesa Iyer, the Law of Torts, page 501; Mitter, Defamation and Malicious Prosecution, page 223; K. G. Kale, The Law of Malicious Prosecution, page 27; (English) Clerk and Lindsell on Torts, Eleventh Edition, page 858; Salmond on Torts, Eleventh Edition, page 747; (American) 34 American Jurisprudence, section 27, page 718 and following; Restatement of the Law,: Torts, Volume III, Chapter XXIX, section 659, Topic 2; 38 Corpus Juris, Malicious Prosecution, sections 47-48; Fleming, page 624 (Australian).

The plaintiff must show that the defendant prosecuted him without reasonable and probable cause. It is when he has led some evidence to this effect that the defendant can be called upon to show the existence of such a cause. The onus lies heavily upon the plaintiff; *Srinivasa Tatachariar* v. *Thiruvenkatachari*[1]. This rule may appear to require the plaintiff to prove a negative, *viz.*, that the defendant had not reasonable and probable cause for the prosecution. But in the words of Bowen, L. J.

"if the assertion of a negative is an essential part of the plaintiff's case, the proof of the assertion still rests upon the plaintiff": *Quartz Hill Gold Mining Co.* v *Eyre*[2].

When the plaintiff has produced evidence which if unrebutted would entitle him to succeed the onus shifts to the defendant to establish the contrary, that is the presence of reasonable and probable cause. To sum up as has been set out in Halsbury's Laws of England (Hailsham Edition), Volume XXII, Part I, page 21, the plaintiff in proving the absence of reasonable and probable cause has to prove a negative and in general need only give slight evidence of such absence.

"Reasonable and probable cause" means simply reasonable cause, the word probable being used with its original meaning of "probable" and hence "reliable". The conjunction of the adjectives "reasonable" and "probable" is a heritage from the redundancies in which the old pleaders delighted. Salmond observes that probable is synonymous with reasonable and means a good cause and that *probabilis causa* was not unknown to classical Latin. The American case-law as well as American text-books speak only of probable cause and do not make use of the phrase "probable and reasonable cause". We naturally follow the English practice. The Australians also do the same (Fleming, page 619).

In a suit for malicious prosecution the important question is whether the facts as known to the defendant or reasonably believed in by him at the material time, constituted a reasonable cause for the prosecution.

The following extracts from the Standard Text Books on the Law of Torts will be helpful.

Salmond on Torts, Eleventh Edition, page 742, has the following to say:

"Reasonable and probable cause means a genuine belief, based on reasonable grounds, that the proceedings are justified. In *Hicks* v. *Faulkner*[3], Hawkins, J. said 'I should define reasonable and probable cause to be an honest belief in the guilt of the accused, based upon a full conviction, founded on reasonable grounds, of the existence of a state of circumstances which, assuming them to be true, would reasonably lead any ordinary, prudent and cautious man, placed in the position of the accused, to the conclusion that the person charged was probably guilty of the crime imputed."

In Ramaswamy Iyer's Law of Torts, pages 321-326, it is stated:

"The issue is one of fact in the ordinary sense that it is a conclusion to be drawn from the circumstances. It is a question of law in England in the sense that it is for the Judge and not for the jury to decide. Where it is shown that the defendant did not believe in the plaintiff's guilt, there is no reasonable and probable cause for him and he cannot be heard to say that the real facts which were unknown to him would make out the plaintiff's guilt. In such a case the defendant's conduct is conclusive evidence not merely of absence of reasonable and probable cause, but also of malice. Where it does

1. A.I.R. 1932 Mad. 601.
2. (1883) L.R. 11 Q.B.D. 674.
3. (1878) L.R. 8 Q.B.D. at 171.

not appear that the defendant had no belief in the plaintiff's guilt, the plaintiff must show that the defendant's conduct was unreasonable in the circumstances. Recklessness, haste, failure to make enquiries or test his information or grounds of suspicion would be evidence of such conduct. On the other hand, the fact that he placed his information fairly before his lawyers and acted on legal advice would be evidence of the contrary. The existence of mere grounds of suspicion would not be reasonable cause. The plaintiff is bound to give some evidence which will *prima facie* suggest absence of reasonable and probable cause; if he does, the onus will then be shifted to the defendant to rebut it. Whether mere proof of the plaintiff's innocence would be such evidence would depend on the facts of each case."

But as pointed out in Clerk and Lindsell on Torts, Eleventh Edition, page 864:

"A man is not bound before instituting proceedings to see that he has such evidence as will be legally sufficient to secure a conviction. In *Dawson* v. *Vansandau*[1], the defendant had preferred a charge of conspiracy against the plaintiff on the evidence of an alleged accomplice, and it was held that he might well have reasonable and probable cause. An accomplice or tainted witness may give evidence sufficient to make out a *prima facie* case and warrant the preferring of a criminal charge, though it might not be sufficient evidence upon which to convict. Neither is it necessary that the defendant should act only on legal evidence and inquire into everything at first hand. It is sufficient if he proceeds on such information as a prudent and cautious man may reasonably accept in the ordinary affairs of life; and it is for the plaintiff to satisfy the jury that there was a want of proper care in testing that information.

It is not justifiable to commence a prosecution on mere suspicion . . . . ."

34 American Jurisprudence, pages 731-732 (section 47) defines probable cause as follows :

"Many definitions of the term 'probable cause' as used in actions for malicious prosecution, differing more or less in their language, are to be found in the decisions. Thus, for instance, probable cause for a criminal prosecution has been defined as a reasonable ground for suspicion, supported by circumstances sufficiently strong in themselves to warrant a cautious, or as some Courts put it, a prudent, man in the belief that the party is guilty of the offence with which he is charged as the existence of such facts and circumstances as would excite belief in a reasonable mind, acting on the facts within the knowledge of the prosecutor, that the person charged was guilty of the offence for which he was prosecuted, and as such facts and circumstances as, when communicated to the generality of men of ordinary and impartial minds, are sufficient to raise in them a belief or real, grave suspicion of the guilt of the person. With reference to civil actions, probable cause has been said to be such reason supported by facts and circumstances as will warrant a cautious man in the belief that his action and the means taken in prosecuting it are legally just and proper. 'Probable cause' in this connection, does not mean sufficient cause; and the question in the action is not whether there was in fact a sufficient cause for the prosecution or proceeding complained of, since the acquittal or failure of the proceeding shows that there was not. A definition sufficiently exact to meet satisfactorily every possible test would be difficult, if not impossible, to furnish for the complete legal idea expressed by the term 'probable cause' is not to be gathered from a mere definition. However, notwithstanding the different wordings of the many judicial definitions before referred to, there seems to be sufficient substantial agreement among them to warrant the statement that the standard of conduct for beginning or continuing any proceeding, whether civil or criminal, is that of a reasonable or ordinarily prudent man placed in the same situation as the defendant. That is if a reasonable man would have believed and acted under the circumstances as the defendant did, there would be probable cause; otherwise not. It is to be noted that the conduct of the defendant is to be weighed in view of what appeared to him at the time of instituting the prior proceeding, not in the light of subsequently appearing facts".

Restatement of the Law: Torts, Volume III, section 662, defines probable cause as follows :—

"One who initiates criminal proceedings against another has probable cause for so doing if he (*a*) reasonably believes that the person accused has acted or failed to act in a particular manner ; and

(*b*) (i) correctly believes that such acts or omissions constitute at common law or under an existing statute the offence charged against the accused, or

(ii) mistakenly so believes in reliance on the advice of counsel under the conditions stated in section 666".

38 Corpus Juris sets out in section 35, pages 405-406, the requisite knowledge of prosecutor, as follows :—

"The facts relied upon to constitute probable cause may be those which are within the personal knowledge of the prosecutor, or those of which he learns from proper, information derived from others, or both. Probable cause is wanting where he acts on facts within his own knowledge which, to his knowledge, do not constitute a crime ; or where notwithstanding the sufficiency of the facts on which he makes this accusation, he has knowledge of other facts which satisfactorily show accused's innocence.

1. (1863) 11 W.R. 516.

If he acts on information derived from others making an accusation, these facts to operate as a defence by way of probable cause must relate to the question of guilt. And the test of the sufficiency of the resulting knowledge is whether it would have justified a prudent, honest and strong suspicion of the guilt of accused. Obviously mere rumour or information of a vague and indefinite nature, or information which the party making the accusation knows to be false or which does not tend to establish the guilt of accused, or a mere statement by third parties that they believe that accused had committed a crime, does not establish probable cause for a prosecution."

But as pointed out in the next section :

"The prosecutor is not bound to verify the correctness of each item of information, or to investigate the crime itself, or to institute an inquiry into the character and antecedents of accused before he attempts to set on foot a criminal prosecution, where he has information on which he is entitled to rely, or to act as a spy on accused for the purpose of ascertaining his defence, or to make inquiries from him or ask him for an explanation, it is sufficient that he acted with such caution, impartiality and diligence as a reasonably prudent man would have used under the circumstances to ascertain the truth of his suspicions. However, if the facts or circumstances put him upon inquiry, he will be charged with knowledge of such facts as he would have learned if he or his agent authorised to investigate had made a proper investigation into the circumstances of the case, including the character and identity of accused."

In addition the following three well-known English decisions may be briefly referred to. In *Herniman* v. *Smith*[1], the House of Lords laid down :

"It is not required of any prosecutor that he must have tested every possible relevant fact before he takes action. His duty is not to ascertain whether there is a defence, but whether there is reasonable and probable cause for a prosecution. Circumstances may exist in which it is right, before charging a man with misconduct to ask him for an explanation; but no general rule can be laid down, and where a person is satisfied, or has apparently sufficient evidence, that he has in fact been cheated, there is no obligation to call on the cheat and ask for an explanation, in as much as to ask for this may only have the effect of causing material evidence to disappear or be manufactured."

In *Tims* v. *John Lewis & Co., Ltd.*,[2], Lord Goddard, C.J., held :—

"The question in an action for malicious prosecution whether there was an absence of reasonable cause for the prosecution has not to be determined subjectively; it is a question which the Court has to determine objectively on the evidence before it ; that is to say, the question is not what, on the evidence known to the prosecutor he did in fact think, but what, as a reasonable person, he ought in the view of the Court, to have thought."

In *Tempest* v. *Snowden*[3], Denning, L.J., has observed :

"It is sometimes said that, in order to have reasonable and probable cause there must be an honest belief in the guilt of the accused. But I do not think that should be regarded as a universal proposition applicable to all cases. It depends on the particular case. There are many justifiable prosecutions where the prosecutor has not himself formed any concluded belief as to the guilt of the accused. If he is a very fair-minded man he may well say to himself. 'The case is so black against the man that I feel I must prosecute, but I am not going to believe him to be guilty unless the Court finds him to be so'. Such a man would, I should have thought, have reasonable and probable cause for instituting a prosecution even though he did not affirmatively believe the man to be guilty. It is said sometimes, that in order to have reasonable and probable cause there must be an honest belief that there was reasonable ground for prosecuting. This again is by no means always necessary. Let me give another illustration. Take the case of a fair-minded man who is personally convinced that the man is guilty but does not himself think the evidence sufficient to justify a prosecution. His solicitor advises him that the evidence is sufficient. He may well say to himself 'I do not myself believe there is sufficient evidence, but my solicitor says there is, so I feel justified in going on'. If the Judge afterwards takes the same view as the solicitor, then I should have thought that such a man would have reasonable and probable cause for instituting a prosecution, even though he did not himself affirmatively believe that there were reasonable grounds for it."

On this topic of absence of reasonable and probable cause the following:—(*a*) English and (*b*) Madras decisions may be usefully consulted (a) *Abrath* v. *N. E. Ry. Co.*[4], *Lelbo* v. *Buckman*[5], *Lister* v. *Perryman*[6], (b) *Lodd Govindoss* v. *Arumuga*[7], *Chenna Reddi* v. *Venkataswami*[8], *Vydianatha Iyer* v. *Krishnaswami Iyer*[9], *Mushtohappa* v. *Hanumantha*[10], *Karuppanna* v. *Haughton*[11], *Nurse* v. *Rustomji*[12], *Albert Bonnan* v *Imperial Tobacco Co.*[13] and *Gopalakrishna* v. *Narayana*[14].

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1. L.R. (1938) A.C. 305.
2. L.R. (1951) 2 K.B. 459.
3. L.R. (1952) 1 K.B. 130.
4. L.R. (1883) 11 Q.B.D. 440.
5. (1952) 2 All E.R. 1057.
6. L.R. (1870) 4 H.L. 521.
7. A.I.R. 1937 Mad. 679 : 46 L.W. 680.
8. (1919) 53 I.C. 70 : 10 L.W. 314.
9. (1911) 24 M.L.J. 515 : I.L.R. 36 Mad. 375.
10. (1946) 2 M.L.J. 484 : A.I.R. 1947 Mad. 236.
11. (1936) 70 M.L.J. 695: I.L.R. 59 Mad. 887.
12. (1923) 46 M.L.J. 353: A.I.R. 1924 Mad. 565.
13. (1929) 57 M.L.J. 558: A.I.R. 1929 P.C. 222 (P.C.)
14. (1918) 34 M.L.J. 517.

We now come to malice which is the last ingredient in a suit for malicious prosecution, and that the defendant was actuated by malice in prosecuting the plaintiff has also got to be proved by the plaintiff. Malice means the presence of some improper and wrongful motive—that is to say an intent to use legal process in question for some other than its legally appointed and appropriate purpose. It means an imporper or indirect motive other than a desire to vindicate public justice or a private right. It need not necessarily be a feeling of enmity, spite or ill-will; it may be due to a desire to obtain to collateral advantage. The malice necessary to be established in a suit for malicious prosecution is not even malice in law such as may be assumed from the intentional doing of a wrongful act, but malice in fact—*malus animus*—indicating that the party was actuated either by spite or ill-will towards an individual, or by indirect or improper motives, though these may be wholly unconnected with any uncharitable feeling towards anybody. A prosecution is not malicious merely because it is inspired by indignation or anger. On the other hand it is one on which the law relies to secure the prosecution of offenders. (Fleming at page 634.) However wrong-headed a prosecutor may be if he honestly thinks that accused has been guilty of a criminal offence he cannot be the initiator of a malicious prosecution. A malicious prosecution says Harper on Torts, page 586 is one that is begun in malice and if there is no malice found to exist in fact the action must fail.

Malice as stated already has to be proved as well as want of reasonable and probable cause in an action for malicious prosecution. No action will lie for the institution of legal proceedings however destitute of reasonable and probable cause unless they are instituted maliciously; *Abu Bucker Ebrahim* v. *Magan Lal Javery*[1], *Braja Sunder Debi* v. *Bamdeb Das*[2], *Karuppanna* v. *Haughton*[3]. The burden of proving malice lies on the plaintiff, and may be discharged by showing either what the motive was and that it was improper, or that the circumstances were such that the prosecution can only be accounted for by imputing some wrong and indirect motive to the prosecutor: *Brown* v. *Hawkes*[4]. *See* the observations on this statement in *Trobridge* v. *Hardy*[5]. But if there is malice alone that too is not sufficient. There must be concurrence of malice and want of probable cause. A person actuated by the plainest malice may nevertheless have a justifiable reason for prosecution. On the other hand substantiating of the accusation is not essential to exonerate the accuser from liability to an action, for he may have had good reason to make the charge, and yet be compelled to abandon the prosecution by the death or absence of witnesses, or the difficulty of producing adequate proof. The law therefore only renders him responsible where malice is combined with want of probable cause. It is also well-settled law that the reputation of the plaintiff and the defendant will be relevant factors in deciding the existence or absence of probable cause.

Bearing these principles in mind if we examine the facts of this case, we find that the concurrent findings of both the Courts below are correct. There is no disputing the fact that the bank was subscribing for several newspapers and that they had accumulated a stock of old papers. In order to get over this Ramadoss tried to establish that these old accumulated papers had been burnt and secondly that certain defunct institutions had left behind a stock of old newspapers. Both Courts below did not accept either the former or the latter allegation. It stands to common sense that the more recent accumulation of the bank's newspapers would not have been burnt in preference to the older stock of papers said to have been left behind by the defunct institutions. It may be taken therefore as safely established that what was sold by Ramadoss was the stock of old accumulated newspapers and unusable articles of the bank.

It is equally well-established that this money has not been brought to the cash account of the bank as Ramadoss was bound to do. It may be that he expended the moneys towards whitewashing, etc. If that were so, he had not been authorised

1. (1940) 1 M.L.J. 668 : A.I.R. 1940 M. 683.
2. (1944) 1 M.L.J. 40 : I.L.R. (1944) Kar. 47 : A.I.R. 1944 P.C. 1.
3. (1936) 70 M.L.J. 695 : I.L.R. 59 Mad. 887 : 1936 M.W.N. 392 : A.I.R. 1936 M. 547.
4. L.R. (1891) 2 Q.B. 718.
5. (1955) 94 C.L.R. 147.

in this behalf. Therefore, the elements for filing a criminal complaint were present. On account of prior ill-feelings this has naturally been seized upon with avidity and a great deal of fuss has been made. In fact it is not disputed that Ramadoss was paid back in his own coin for what he did to others on the audit report of 1945. This would not however enable Ramadoss to maintain a suit for damages because if there is malice alone it is not sufficient. There must be concurrence of malice and want of probable cause. A person actuated by the plainest malice may nevertheless have a justifiable cause for launching prosecution. In fact this has been illustrated by Lord Macaulay in his draft of the Indian Penal Code by a forcible example. Suppose, for instance there is great ill-feeling between *A* and *B* and *B* is lawfully condemned to death in a murder case by a duly authorised Court of the land and if *A* goes and offers his offices to do without wages the unpleasant task of hanging *B* and this offer is accepted by the authorities, *A* would not be committing an offence, though *A* was actuated by the bitterest malice in undertaking this unpleasant task on himself. The complaint in this case had been laid after the matter had been reported to the Deputy Registrar of Co-operative Societies and after obtaining legal advice. Therefore, on these established facts both the Court below came to the right conclusion and their decision merits no interference.

In the result, this second appeal has got to be and is hereby dismissed with costs.

No leave.

R.M. ——— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE BASHEER AHMED SAYEED.

Pakkiriswami Pillai .. *Petitioner**

v.

The Municipal Commissioner, Tanjore .. *Respondent.*

Madras District Municipalities Act (V of 1920), section 270—Running a lorry-stand within a municipality without a licence—What amounts to.

The mere fact that lorries are parked on a particular site in a municipality for the purposes of loading or unloading and the accused was a broker dealing in the securing of custom for such lorries would not by itself suffice to presume that the accused is running a lorry-stand in that place. Before an accused could be held to have run a lorry-stand on a particular site, without a licence contrary to the provisions of the District Municipalities Act, it should be proved that the accused had control over the use of that land and lorries were parked in the place with his permission.

Petition under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the Judgment of the Court of the Special First Class Magistrate, Tanjore, dated 20th December, 1956 and made in C.C. No. 2 of 1956.

G. R. Jagadisan and *T. S. Srinivasan*, for Petitioner.

The Public Prosecutor (*P. S. Kailasam*), for Respondent.

The Court made the following

ORDER.—This Revision Petition is by accused 2 who has been found guilty under section 270 of the District Municipalities Act and has been sentenced to a fine of Rs. 50 and in default to simple imprisonment for one week, by the learned Special First Class Magistrate, Tanjore, in C.C. No. 2 of 1956. The charge against the petitioner was that he along with accused 1, who is not before me, was running a lorry-stand in T.S. No. 2985/P of Ward 6 of Tanjore Municipality without a licence and had therefore committed an offence punishable under section 270 of the District Municipalities Act.

The owner of the land is accused 1 who has been acquitted on the ground that there was no evidence that he had used his land as a stand for parking

*Cr.R.C. No. 258 of 1957. 11th September, 1957.
(Cr.R.P. No. 253 of 1957).

lorries. It has not been proved that he had leased out this land to accused 2, the petitioner before me, for such a purpose. Nor has it been proved by any evidence that the petitioner had any control over the use of this land, either by way of a lease or by any permission or licence from its owner. Except the evidence of P.W. 6 who says that he saw lorries being parked on the side in question and given expression to his opinion or inference that these lorries were being parked on the site for the purpose of loading and unloading with the permission of the petitioner, there is no other evidence which would be accepted. The mere fact that lorries are parked on the site for the purpose of loading and unloading and the fact that the petitioner is a broker dealing in the securing of custom for lorries, which happen to come to the site in question, would not amount to running of a stand for lorries. Parking of the lorries on the site must be directly attributable to the accused and his responsibility therefor should be established. In order to prove that the petitioner was really using the land in question not belonging to him as a stand for lorries, something more must be established. He should either have control over the land or exercise authority over the land. He must be in a position to allow or disallow the parking of lorries on the land, or he must be making some benefit by allowing the lorries to be parked on the site in question. If lorry-drivers bring their lorries and park them on a vacant site near the office of the accused, unless it is proved that they do so on his permission only, it cannot be said that the accused is using the vacant site as a lorry-stand. When nothing of these things is proved, it cannot be said that the prosecution has established a case that the petitioner has been using the land as a stand for the parking of lorries, and that he was doing so without a licence. I do not think that the conviction is therefore based on any evidence which could be said to have brought home the guilt to the accused-petitioner. The petitioner is therefore entitled to be acquitted. The conviction and the sentence are both set aside; and the fine, if paid, will be refunded.

R.M. *Conviction and sentence set aside.*

[FULL BENCH].

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. P. RAJAGOPALAN, *Officiating Chief Justice*, MR. JUSTICE RAMASWAMI AND MR. JUSTICE RAJAGOPALA AYYANGAR.

Board of Revenue .. *Referring Authority**

v.

T. M. Madalai Nadar and Co., Virudhunagar .. *Respondent.*

Stamp Act (II of 1899), *Articles* 19 *and* 33 (b) *of Schedule I-A (Madras Amendment)—Deed of dissolution of partnership—Partner relinquishing his interest in the partnership properties—If amounts to conveyance.*

A deed of dissolution of partnership which recites that the outgoing partner shall have no interest whatsoever in any of the properties of the partnership and provides for the ascertainment of the profits payable to such partner cannot be said to amount also to a conveyance deed of the interest of the outgoing partner. Any payment made to such a partner when the partnership was in existence cannot be construed to be the consideration to render the deed of dissolution of partnership as one of conveyance. Such a deed is chargeable to stamp duty only under Article 39 (*b*) of Schedule I-A of the Stamp Act and not under Article 19.

Hiralal Nayalram, in the matter of, (1908) I.L.R. 32 Bom. 505 and *Board of Revenue* v *Murugesa Mudaliar*, (1955) 2 M.L.J. 166, distinguished.

Case referred to the High Court by the Referring Authority, under section 57 of the Indian Stamp Act, for its decision on the following question of law, *viz.*,

"Whether the Document, dated 12th May, 1953, is correctly classified as dissolution of partnership and conveyance, chargeable with stamp duty under Article 39 (*b*) and 19 of Schedule I-A of the Stamp Act, respectively.

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* C.R. No. 107 of 1956. 18th November, 1957.

The Government Pleader (*B. V. Viswanatha Ayyar*), for the Referring Authority.

M. Subbaroya Ayyar, V. Sethuraman, S. Padmanabhan and *S. V. Subramanian*, for Respondent.

The Order of the Court was made by

Rajagopala Ayyangar, J.—The question which has been referred to this Court for decision is:

"Whether the document dated 12th May, 1953, is correctly classified as dissolution of partnership and conveyance, chargeable with stamp duty under Articles 39 (*b*) and 19 of Schedule I-A of the Stamp Act, respectively."

Two persons Rajakanni Nadar and Mathalai Nadar were carrying on business in partnership under the name of T.M.M. Mathalai Nadar and Company. The partnership was started under a deed, dated 16th of August, 1944. The document, the stamp in regard to which is now in question, purports to be a deed of dissolution, dated 12th May, 1953. It recites the fact that these two partners, Mathalai Nadar and Rajakanni Nadar, were carrying on business in partnership that there had been a partition in the family of Rajakanni Nadar, that is between himself and his sons, on the 8th of April 1953, that they were entering into this dissolution, and that he was consequently dissolving the partnership between himself and Mathalai Nadar. It also recited that in the place of Rajakanni Nadar, Mathalai Nadar had agreed to admit to the partnership or to the benefits thereof the sons of Rajakanni Nadar. The usual clauses of dissolution namely that Rajakanni Nadar shall have no interest in the properties and goodwill, etc. of Mathalai Nadar and Company are to be found in the deed. The clause relevant to the present context is clause (3) which recites that Rajakanni Nadar shall have no interest whatsoever in any of the properties—goodwill, stock and outstandings of the firm, subsequent to the 30th of Panguni, Nandana (12th April, 1953). Clause (4) provides for the ascertainment of the profits payable to Rajakanni Nadar for a period of eight months ending with 12th of April, 1953. Clause (5) concludes by saying

"Except the proportionate share of profit abovementioned and except the amount to which T. M. M. Rajakanni Nadar of us is entitled as per the recitals made in the family partition deed, Rajakanni Nadar of us shall have no right whatever in the outstandings due to the aforesaid Mathalai Nadar and Company, the amounts payable by the same and stock, etc.... We have agreed unanimously as regards the aforesaid terms and for the purpose of carrying on as from 1st Chitrai of the current Vijaya year, we have affixed our signature with our consent."

This deed was stamped as a deed of dissolution pure and simple. When it was presented for registration the sufficiency of the stamp was questioned the case raised against the respondent being that the deed comprised not merely a deed of dissolution but it was also one of conveyance. The statement of Rajakanni Nadar in regard to the circumstance in which the document came into existence as well as the transactions which preceded it was recorded by the Sub-Registrar. In the course of this evidence, Rajakanni Nadar stated that the total capital of the partnership was Rs. 76,000 out of which Rs. 44,000 had been contributed by Mathalai Nadar and Rs. 32,000 by himself, and that long before the dissolution, on the 31st of Adi, corresponding to the middle of August, 1952, he had received this Rs. 32,000 his capital contribution, and that, therefore, he entered into the deed of dissolution by which the partnership relation between himself and Mathalai Nadar was severed. He also stated that this receipt of Rs. 32,000 had nothing to do with the deed of dissolution, dated 12th May, 1953.

The question we have now to consider is whether on these facts there is any conveyance involved in this transaction. If one went by the recitals in the document it included no conveyance, because the conveyance is now said to be constituted by the receipt of Rs. 32,000 by Rajakanni Nadar, which is stated to be as consideration for his relinquishing his interest in the partnership. Those are not the terms of the deed of dissolution which is before us. If the evidence or the statement of Rajakanni Nadar before the registering officer were the test by which the nature of the transaction is to be ascertained, it cannot lead to the conclusion that any conveyance was

involved in the document. The statement as we have mentioned earlier is that Rajakanni Nadar had even while the partnership was still in existence withdrawn his capital contribution of Rs. 32,000 from the firm. That cannot amount to any conveyance, nor can it be said that this document which is before us constituted a conveyance for that figure.

Learned Government Pleader invited our attention to the decision of a Special Bench of the Bombay High Court reported in *Hiralal Nayalram*, In the matter of.[1] That was a case where there was a specific conveyance of the share of a partner to the other partners who continued the business. We had occasion to refer to this decision and the exact point which it decided in *Board of Revenue* v. *Murugesa Mudaliar*[2]. No such transaction is involved in the present case and the decision in *Hiralal Nayalram*, In the matter of[1], has no relevance to the facts here.

We asked the learned counsel for the State as to whether, if a deed of dissolution provided for accounts being taken as between the partners, he would contend that the sum which was ultimately payable or paid by one to the other could be treated to be a conveyance for that sum, in addition to the deed being a deed of dissolution. The learned Government Pleader stated that that would not be his contention. We consider the present case *a fortiori*. Here the payment of Rs. 32,000 was made not under the deed but during the time when the partnership was *in esse*. There were, therefore, no elements to render this deed one of conveyance.

We, therefore, answer the question by saying that the document, dated 12th of May, 1953, was properly stamped as a deed of dissolution chargeable under Article 39 (*b*) of Schedule I-A of the Stamp Act. There will be no order as to costs.

R.M. ——— *Reference answered.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

(Special Original Jurisdiction.)

PRESENT :—MR. JUSTICE RAJAGOPALAN.

C. M. George, Partner of Messrs. Cherian Bros. (now dissolved) .. *Petitioner**

v.

Income-tax Officer, Madras, Special Circle, now the Income-tax Officer, Second Additional Circle, and another .. *Respondents.*

Income-tax Act (XI of 1922), section 46 (2) and (7)—Recovery of tax—Certificate under section 46 (2) to the Collector—Subsequent reduction on appeal of tax due—Effect on original certificate.

A certificate issued to the Collector by an Income-tax Officer under section 46 (2) of the Income-tax Act for collection of tax due is a proceeding for the recovery of the tax payable within the meaning of section 46 (7) of the Act. A certificate issued within the time allowed mentioning the tax amount due as on that date according to the assessment order in force then, will not become invalid by reason of any subsequent reduction in the tax amount lawfully effected in appeal by the Commissioner though of course only the amount lawfully due could be recovered on the basis of the original certificate.

Lalduram Taparia v. *D. K. Ghosh*, (1955) 29 I.T.R. 103, approved.

Petition under Article 226 of the Constitution of India, praying that in the circumstances stated therein, and in the affidavit filed therewith the High Court will be pleased to issue a writ of prohibition prohibiting the respondents from proceeding to recover the sum of Rs. 47,229-5-0 (made up of Rs. 15,513-5-0 the excess profits tax for the chargeable accounting period 1st April, 1944 to 31st March, 1945 and Rs. 31,716—0—0, the excess profits tax for the chargeable accounting period 1st April, 1945 to 31st March, 1946 as demanded by the 2nd respondent in his demand Notice I.T. No. 321 of 1955, dated 11th June, 1955.)

R. Kesava Ayyangar, for Petitioner.

C. S. Ramarao Sahib, Special Counsel for Income-tax, for Respondent.

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1. (1908) I.L.R. 32 Bom. 505. 2. (1955) 2 M.L.J. 166.

* W.P. No. 698 of 1955. 16th September, 1957.

The Court made the following

ORDER.—The Petitioner was liable to be assessed to excess profits tax for the chargeable accounting periods 1st April, 1944, to 31st March, 1945 and 1st April, 1945, to 31st March, 1946. On 31st December, 1951, the Excess Profits Tax Officer completed his assessment and levied a tax of Rs. 29,149-5-0 and Rs. 83,580 respectively for the two chargeable accounting periods. Demand notices under section 29 of the Income-tax Act were issued to the assessee on 30th April, 1952.

The assessee preferred appeals against these assessments. Independently of the appeals, however, the Commissioner exercised his revisional jurisdiction and reduced the tax liability of the petitioner by the order dated 7th January, 1954. The tax payable by the assessee with reference to the accounting period 1944-45 was reduced to Rs. 15,513-5-0 and that for 1945-46 was reduced to Rs. 31,716-0-0. The total of the taxes due from the assessee thus came to Rs. 47,229-5-0.

On 13th March, 1953, the Excess Profits Tax Officer issued a certificate to the Collector under section 46 (2) of the Act for the recovery of the taxes due. It should be remembered that on that date though the appeals preferred by the petitioners were pending the taxes due under the demand notices were those assessed by the Excess Profits Tax Officer. They were much in excess of the tax liability that was ultimately determined on 7th January, 1954. After the liability had been revised by the Commissioner on 7th January, 1954, the Excess Profits Tax Officer informed the Collector on 13th April, 1955 and asked him to revise the figures.

On 11th June, 1955, the Collector demanded of the petitioner the amount of the taxes as finally revised by the Commissioner which figures had been communicated to the Collector. A notice of demand would also appear to have been issued under the provisions of the Revenue Recovery Act (II of 1864). The petitioner, it should be noted, is a resident of Madras. Section 64 bars the application of the provisions of Act (II of 1864) to that class of persons.

The petitioner applied under Article 226 of the Constitution for the issue of a writ of prohibition to restrain the Income-tax Officer and the Collector of Madras from seeking to recover any portion of Rs. 47,229-5-0 which represented the excess profits tax due from the petitioner.

The main contention of the petitioner, that recovery of the tax due was barred by limitation was really based upon a misconception, to a considerable extent caused by the averments in the first counter-affidavit filed in these proceedings. The counter-affidavit disclosed that the certificate issued by the Excess Profits Tax Officer on 13th March, 1953, had been misplaced. The learned counsel for the petitioner referred to the terms of section 46 (2) of the Act which ran :

" The Income-tax Officer may forward to the Collector a certificate under his signature specifying the amount of arrears due from an assessee and the Collector on receipt of such certificate shall proceed to recover from such assessee the amount specified therein as if it were an arrear of land revenue."

The learned counsel contended that the burden lay upon the Department not merely to prove that the certificate had been forwarded but that it had also been received by the Collector, and unless both these tests were satisfied, the Collector would have no jurisdiction to recover anything from the assessee. It may not be necessary to examine the soundness of this contention in these proceedings. The Department made it clear in its supplementary affidavit that the certificate dated 13th March, 1953, had in fact been received by the Collector and was in due course forwarded to the Deputy Tahsildar. No doubt the original certificate itself has been misplaced. But there is certainly proof that the certificate, dated 13th March, 1953, was in fact received in the Officer of the Collector of Madras.

Section 46 (7) no doubt directs :

"........no proceedings for the recovery of any sum payable under this Act shall be commenced after the expiration of one year from the last day of the financial year in which any demand is made under this Act."

The demand was made of the petitioner on 30th April, 1952. The certificate dated 13th March, 1953, was within the period permitted by section 46 (7) of the Act.

The learned counsel for the petitioner urged that since admittedly the certificate, dated 13th March, 1953, did not show the correct figure, it was not a valid certificate and was *non est* in law. I have set out earlier that after the Commissioner revised the assessment on 7th January, 1954, the Collector was informed on 13th April, 1955, of the revised figure, that is of the amount lawfully due from the petitioner. The learned counsel for the petitioner contended that 13th April, 1955, should be taken as the date on which " proceedings were commenced " within the meaning of section 46 (7) of the Act, in which case these proceedings were clearly barred by limitation.

That the certificate dated 13th March, 1955, was a proceeding for the recovery of the tax payable within the meaning of section 46 (7) can admit of no doubt—*See also Arunadevi Jajodia* v. *Collector of Madras*[1].

The learned counsel for the petitioner contended that in view of the *Explanation* to section 46 (7) added by the Amending Act of 1953 the principle laid down in *Arunadevi Jajodia's case*[1], should be treated as no longer good law. I am unable to agree. The principle still remains the same. A certificate issued under section 46 (2) is a proceeding to recover a tax due from the assessee.

The only other point that remains for consideration is whether the certificate dated 13th March, 1953, should be treated as *non est* in law, because the amount of tax due from the assessee was admittedly less than what was shown in that certificate. The amount was reduced by the order of the Commissioner, dated 7th January, 1954. Of course, it is only the amount as finally revised by the Commissioner Rs. 47,229-5-0 that can be lawfully collected from the assessee. The question, however, is whether that sum can be collected now on the basis of the certificate issued on 13th March, 1953, before the tax liability was reduced by the Commissioner in exercise of the jurisdiction vested in him. It was never the contention of the petitioner that the particulars entered in the certificate issued on 13th March, 1953, were not correct and were not in accordance with the orders of assessment in force then. The pendency of the appeal did not affect that correctness. The orders of the Commissioner were long after on 7th January, 1954. A subsequent reduction lawfully effected of the liability of an assessee to pay a tax cannot in my opinion, affect the validity of the certificate that was issued under section 46 (2); in this case the certificate was issued on 13th March, 1953. As I said, it was a proceeding taken to recover the arrears due. The right is to recover the arrears lawfully due. The amount lawfully due is no doubt less than what was originally demanded. But what was originally demanded was in accordance with the order of the assessment passed by the Excess Profits Tax Officer. In my opinion, the Collector was entitled to take proceedings on the basis of the certificate, dated 13th March, 1953, though of course only the amount lawfully due from the petitioner could be recovered on the basis of that certificate.

The learned counsel for the respondent referred to *Laduram Taparia* v. *D. K. Ghosh*[2], where at page 114, Sinha, J., observed :

> " ....it is not disputed that the Certificate Officer has the power to amend the certificate. Thus where the amount of tax due has been scaled down by the appellate authority, I do not see why it is incompetent to amend the certificate so that proceedings would continue for the realisation of the reduced amount as ordered by the appellate authority. I do not think that in such a case it is necessary to issue a fresh notice, wiping off the entire certificate proceedings had up to that point of time."

I respectfully agree.

I pointed out earlier that the notice of demand was issued by the Collector under the provisions of Madras Act (II of 1864). The learned counsel for the petitioner is contending that that notice was unenforceable. That was not a point taken by the petitioner in his affidavit and I need not rest my decision in this case on that feature of the case. It was not the notice of demand issued by the Collector that was really

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1. (1952) 2 M.L.J. 4. 2. (1955) 29 I.T.R. 103.

objected to. What the petitioner really wanted was an immunity from payment of the excess profis tax on the ground that the proceedings taken by the Collector to recover that amount as arrear of land revenue were barred by the period of limitation prescribed by section 46 (7) of the Act. That contention must be rejected.

The rule is discharged and the petition is dismissed with costs. Counsel's fee Rs. 150.

R.M. *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE PANCHAPAKESA AYYAR.

Palaniappa Chettiar .. *Petitioner**

v.

Rasu Naidu and others .. *Respondents.*

Practice—Suit on promissory note—Books of money-lenders presumed by trial Court to be faked—Summary rejection and disregard of oral and documentary evidence—Propriety and legality.

It would be utterly perverse and indefensible under the law to take the view that the account books of money-lenders must be presumed to be forged and such account-books should be disregarded summarily and the oral evidence of the debtors should be preferred to the entries in the account-books, the recitals in the promissory notes and the oral evidence of the money-lenders.

Petition under section 25 of Act IX of 1887, praying the High Court to revise the Decree of the Court of the District Munsif, Pudukottai, dated 21st April, 1955 and passed in S.C.S. No. 162 of 1954.

V. Seshadri, K. S. Ramamurthi and *K Hariharan*, for Petitioner.

K. S. Desikan and *K. Raman*, for Respondents.

The Court delivered the following

JUDGMENT.—This is a petition filed by one Palaniappa Chettiar, the plaintiff in S.C.S. No. 162 of 1954 on the file of the District Munsif of Pudukottai, for revising and setting aside the judgment and decree of the learned District Munsif dismissing the suit with costs. The facts are briefly these.

The suit was filed by the petitioner, a Nattukottai Chettiar, for recovering Rs. 274-8 from the respondents being the amount due on two promissory notes executed in his favour by the first and second respondents. The respondents contended that they really were not given the Rs. 250, the principal, under the two promissory notes, as pretended by the plaintiff and that this sum represented excess interest (over the 12 per cent. per annum mentioned) not claimable under the present Acts giving relief regarding interest but collected by the Nattukottai Chettiar, the plaintiff, and ingeniously incorporated as two amounts lent under these promissory notes. There was no evidence regarding this extraordinary contention except the oral evidence of the first defendant, as D.W. 1, whereas the plaintiff not only examined himself as P.W. 1 to prove the payment of Rs. 250 in cash but also filed the promissory notes in question and his day-book and ledger which clearly showed that the Rs. 250 were advanced in cash towards the promissory notes and did not represent bogus amounts or would have been amounts of expected lost interest as urged by the defendants. The learned District Munsif took the extraordinary view that the account-books of money-lenders must be presumed to be faked from the beginning to end and so such account-books should be disregarded summarily and the oral evidence of an interested party like the first defendant preferred to the entries in these account-books, the recitals in the promissory notes and the oral evidence of the money-lender himself. He held further that in such cases he had an absolute discretion to believe the oral evidence of an interested defendant and disregard the oral and documentary evidence furnished by the plaintiff, his account-books and the promissory notes. So he dismissed the suit with costs.

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* C.R.P. No. 882 of 1955. 18th July, 1957.

I have perused the entire records and heard learned counsel on both sides. The learned counsel for the petitioner urged that the view taken by the trial Judge regarding money-lenders and their account-books and the recitals in promissory notes taken by them was utterly perverse and indefensible under our law. I entirely agree. The fact that we are living in a Republic and are working towards a socialistic pattern of society does not mean that every man of status should be presumed to be a perjurer, and every money-lender to be a forger and fabricator of accounts. That will be an anti-social view and not a socialistic view. The remarks of the learned District Munsif in paragraph 8 of his judgment :

"The accounts books of a money-lender are naturally cooked up even from the beginning to suit the allegations made by him, so that the fact of Exhibits A-4 and A-5 mentioning the payment of consideration even for Exhibits A-2 and A-3 cannot be taken as furthering the case of affording proof of the plaintiff's case. The circumstances and probabilities are to be taken as safer guides in finding out the truth"

are as astonishing as they are bad law.

Mr. K. S. Desikan, learned counsel for the respondents, could not support the above views as either correct or judicious. Times were when the Nattukottai Chettiars' accounts were taken to be accurate and were never even questioned. Perhaps those times have passed. But the times when money-lenders' accounts, including Nattukottai Chettiars' accounts, are to be presumed to be forgeries are yet to come ; and I do hope will never come. The oral and documentary evidence in favour of the plaintiff's case was overwhelming. The only evidence *contra* was the interested, absurd and incredible evidence of D.W. 1.

In the result, I set aside the judgment and decree of the lower Court and decree the suit with the costs in the lower Court, as prayed for. But I direct all the parties to bear their own costs in this C.R.P. as the respondents can in no way be held responsible for the extraordinary views of the learned District Munsif regarding money-lenders' accounts and the alleged conclusive presumption regarding their being always forged.

V.S. ——— *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE GANAPATIA PILLAI.

S. K. Mahamad Kasim Rowther .. *Appellant**

v.

Noor Mahamed Rowther and others *Respondents.*

Arbitration Act (X of 1940), section 17—Suit to enforce an award—Person eo nomine not a party to the reference to arbitration impleaded as a party to the suit—Order appointing Receiver in respect of his properties—Legality.

Where a person was *eo nomine* not a party to the reference to arbitration proceedings he could not have been impleaded as a party to the proceedings to enforce the award and so the Court would have no jurisdiction to appoint a Receiver in respect of his properties.

Subramanian v. *Vasudevan Chettiar*, (1950) 1 M.L.J. 237, followed.

Appeal against the Order of the Court of the Subordinate Judge of Pudukottai, dated the 5th December, 1956 and made in I.A. No. 605 of 1956 in O.S. No.53 of 1956.

S. Ramachandra Ayyar and *V. S. Ramakrishnan*, for Appellant.

K. S. Desikan and *N. Srivatsamani*, for Respondents.

The Court delivered the following

JUDGMENT.—The appellant in this Civil Miscellaneous Appeal is the second defendant in O.S. No. 53 of 1956 on the file of the Subordinate Judge of Pudukottai. That was an application numbered as a suit, made by the first respondent for enforcing an award and passing a decree in terms thereof. The muchilika on which

* A.A.O. No. 405 of 1956. 9th October, 1957.

that award proceeded is Exhibit A-1. The learned Judge in the Court below on the application of the first respondent appointed a Receiver to take possession of three buses belonging to the partnership which was created under Exhibit B-1. The plaintiff in the lower Court came forward with the claim that by reason of Exhibit B-1 which was executed on 6th November, 1948, he became a partner with the first defendant in respect of the buses in question which were being run under the name of Mohideen Andavar Bus Service. The learned Judge accepted this contention and holding that the second defendant was really a benamidar for the first defendant, appointed a Receiver to take possession of the buses in dispute.

Mr. Ramachandra Ayyar, learned counsel for the appellant, made the following submissions. The first was that the reference to arbitration based upon Exhibit A-1 was signed only by the first defendant and was not signed by the second defendant, the present appellant, and consequently no proceeding taken under the Arbitration Act to enforce the award based upon Exhibit A-1 can reach the appellant or his properties. The second was that the lower Court had no jurisdiction to pass the order appointing a Receiver for properties which belonged to the appellant when *eo nomine* he was not a party to the reference and consequently he should not have been made a party to the proceeding before the lower Court under Order 1, rule 10, Code of Civil Procedure. In my opinion, both these contentions are well-founded. It is true, as Mr. Desikan, learned counsel for the first respondent, pointed to me, that the first defendant has signed Exhibit A-1 as Mohamad Kasim & Co. From this he wants me to draw the inference that the father and son were either partners in the bus service or were jointly interested in the buses. He also pointed out to me the observation of the lower Court that on the date of Exhibit B-1 the second defendant was a minor and that consequently the benefit of that argeement should go to the first defendant. Mr. Ramachandra Ayyar, learned counsel for the appellant, disputes the correctness of the statement of the lower Court that the appellant was a minor on the date of Exhibit B-1. There is no evidence available now to determine this point. But *ex facie* Exhibit B-1 purports to be executed by the first respondent plaintiff to the second defendant who is described there as the proprietor of the Mohideen Andavar Bus Service. Whatever may be the right *inter se* between the plaintiff and the second defendant, by reason of Exhibit B-1, it is clear that the very basis of the suit in the lower Court to enforce the award is the contract Exhibit B-1 between the second defendant and the plaintiff. In the course of the running of the buses after 1948 disputes arose and the parties entered into the Panchayat Muchilika Exhibit A-1 on 8th February, 1955, by which they named five persons as arbitrators to settle their differences. But unfortunately the appellant was not a party to Exhibit A-1. It has been laid down by Krishnaswami Nayudu, J., in *Subramanian* v. *Vasudevan Chettiar*[1], that in a proceeding to enforce an award either at the instance of a party to the award or at the instance of the arbitrator himself, no person can be impleaded except one who is *eo nomine* a party to that reference and arbitration and with respect I agree with that opinion. The learned counsel Mr. Desikan does not dispute the correctness of the proposition of law laid down by Krishnaswami Nayudu, J., in that case. It follows that whatever may be the rights of the first respondent either in the bus service or in the assets of the firm, the appellant could not have been impleaded as a party to the proceeding O.S. No. 53 of 1956 which should have been confined to persons who were *eo nomine* parties to Exhibit A-1. The lower Court had therefore no jurisdiction over the present appellant in the proceeding in O.S. No. 53 of 1956 and consequently had no jurisdiction to pass an order appointing a Receiver. Mr. Ramachandra Ayyar, learned counsel for the appellant, mentioned to me another argument *viz.*, that by reason of the proviso to rule 1 of Order 40, Code of Civil Procedure, the lower Court had no jurisdiction by making an order appointing a Receiver to prejudice the rights or properties of third parties. Strictly speaking the present appellant cannot be stated to be a third party to the proceeding in which the order of appointment of Receiver has

1. (1950) 1 M.L.J. 237.

been made. But on a true construction of the nature of the proceeding, it is apparent that the lower Court had no jurisdiction to implead the present appellant. In this view the present appellant can be deemed to be a third party to the proceeding and his rights could not be affected by any order of appointment of a Receiver. The appeal is therefore allowed and the order of the lower Court is set aside. I.A. No. 605 of 1956 on the file of the lower Court is dismissed with costs in both the Courts.

V.S. ——— *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE SUBRAHMANYAM.

Muni Ammal .. *Petitioner**

v.

Govindarajan and another .. *Respondents.*

Evidence Act (I of 1872), section 65 (a), clauses (2) and (3)—Scope—Secondary evidence by a copy of a document—Admissibility.

Where a will is in the possession of a person describing himself a *notaire* in French territory and who states in the witness-box that he is under an obligation not to produce the will in any Court in the Indian Union and so would not produce the will,

Held :—Either the *notaire* is a person who can legally be compelled by the Court to produce the document or is a person who cannot be legally compelled to do so. If the person is not one who can be legally compelled to produce the original then he is not subject to the process of the Court in the matter of the production of the will and under the second clause of section 65 (*a*) of the Evidence Act secondary evidence in the form of the authenticated copy becomes admissible.

If, on the other hand, he is a person legally bound to produce the original, he refuses to produce it notwithstanding notice to do so then under the third clause of section 65 (*a*) secondary evidence becomes admissible.

Petition under section 115 of Act V of 1908 praying the High Court to revise the Order of the Court of the District Munsif of Nagapattinam, dated 20th July, 1956 and made in O.S. No. 24 of 1955.

T. S. Kuppuswami Iyer, for Petitioner.

R. Purushotham, for Respondent No. 1.

The Court made the following

ORDER.—The first defendant-petitioner relied on a will to support her case. The will is in the possession of D.W. 1 who describes himself as a *notaire* in French territory. He lives in French territory. He states that, under the French Law, he is under an obligation not to produce the will in any Court in the Indian Union. In the witness-box he states that he would not produce the will. The first defendant-petitioner produces an authenticated copy of the will. It is not denied that, if the original will were lost, the copy can be used to prove the existence and contents of the original will, under section 65 of the Indian Evidence Act. The learned District Munsif held that, because the original will is in the possession of the *notaire*, the copy could not be received in evidence under section 65 of the Evidence Act. The order of the learned District Munsif cannot be supported. Either the *notaire* is a person who can legally be compelled by the District Munsif to produce the document or is a person who cannot be legally compelled to do so. If he is not a person who can be legally compelled, then he is not subject to the process of the District Munsif's Court in the matter of the production of the will and secondary evidence in the form of the authenticated copy becomes admissible under the second clause of section 65 (*a*) of the Evidence Act. On the other hand, if he is a person who is legally bound to produce the will, he refuses to produce it notwithstanding notice to do so, and on these facts, the existence and contents of the original will can be proved under the third clause of section 65 (*a*) of the Evidence Act by proof of the authenticated copy.

* C.R.P. No. 1376 of 1956. 22nd November, 1957.

The order of the District Munsif is set aside. He will permit the first defendant petitioner to prove the existence and contents of the will by proving the authenticated copy that is produced. The Civil Revision Petition is allowed. The parties will bear their own costs.

V.S. — *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE RAMASWAMI.

Vidyudavalli Thayar .. *Appellant**.

Practice—Leave to sue in forma pauperis*—Refusal of—Failure to pay Court-fee within time granted—Rejection of O.P.—Remedy of plaintiff—If could file a revision against the original order of refusal of permission to sue as a pauper—Appeal—If proper remedy.*

Civil Procedure Code (V of 1908), Order 42, rule 1, clause (nn)—(Madras Amendment) and Order 33, rules 5 and 7—Appeal from an order rejecting an application for leave to sue as a pauper—When could lie.

Madras Court-Fees and Suits Valuation Act (XIV of 1955), sections 50 and 52—Court-fee payable in an appeal against an order rejecting a petition for leave to sue in forma pauperis *and rejection of plaint for non-payment of Court-fee.*

Where an application to file a suit *in forma pauperis* is rejected and time is given for payment of Court-fee and if the Court-fee is not paid within the time prescribed the petition is rejected, the remedy for the petitioner is to file an appeal against the order rejecting the petition and no revision could lie against the earlier order of refusal of leave to sue *in forma pauperis.*

In such cases the subject-matter of the appeal is only the right of the appellant to seek his remedy as a pauper and is as such incapable of valuation as it does not touch the merits of the subject-matter of the suit. Hence the Court-fee need not be paid on the *ad valorem* basis for the appeal. Court-fee can be paid on a fixed basis under section 52 of the Madras Court-fees and Suits Valuation Act, 1955, read with section 50 of the said Act.

Appeal sought to be preferred against the Order of the City Civil Court of Madras, dated 12th February, 1957 and made in O.P. No. 75 of 1956.

The matter was placed before His Lordship for Orders with the following Office Note:—

1. The appellant herein who appears in person filed O.P. No. 75 of 1956 in the City Civil Court, Madras, for leave to file a suit *in forma pauperis* for the recovery of Rs. 22,103 as damages caused to her by the illegal sale of her jewellery pledged with the defendant. Her petition was dismissed by the lower Court on 12th February, 1957, but she was granted time for payment of Court-fee till 28th February, 1957, which was subsequently extended till 18th March, 1957, and as no Court-fee was paid the petition was rejected by order of the lower Court, dated 18th March, 1957. The petitioner thereupon presented the above C.M.A. in this Court on 19th March, 1957, purporting to be against the order refusing leave, dated 12th February, 1957, without however disclosing either in the appeal memo. or in the affidavit filed in supprt of the stay petition, the fact that the O.P. itself had been rejected on the previous day for non-payment of Court-fee. This fact was disclosed by her only in her endorsement, dated 3rd August, 1957, after two returns by the office.

2. The questions now arising for consideration are (1) whether in view of the subsequent rejection of O.P. itself for non-payment of Court-fee, any remedy is now available to her against the earlier order, dated 12th Feburary, 1957; and if so (2) whether the proper proceeding to be taken is a C.M.A. under Order 43, rule (*nn*), Civil Procedure Code as now sought to be filed or whether a Civil Revision Petition should be filed under section 115, Civil Procedure Code, considering that leave was refused by the lower Court mainly on the ground that she is not a pauper, the question of limitation being only touched upon incidentally. It may also be pointed in this connection that the grounds taken in the appeal are only against the findings of the lower Court regarding the pauperism of the plaintiff, more appropriate for a Civil Revision Petition while Order 43, rule (*nn*) inheres a right of appeal only in cases where leave to sue as a pauper is refused on the grounds specified in clause (*d*) or clause (*d*-1) of Order 33, rule 5, Civil Procedure Code (where the allegations do not show a cause of action or where the suit appears to be barred by any law).

3. It was held by Panchapakesa Ayyar, J., in the case reported in *Bommisetti Ramayamma*, In re, (1954) 1 M.L.J. 544 (following the Full Bench decision of this Court reported in *Satyanarayanacharyulu* v. *Ramalingam*, (1951) 2 M.L.J. 74 (F.B.) to which His Lordship was also a party) that whereafter a petition for leave to sue as pauper is rejected, the petitioner waits till the time granted for payment of Court-fee expires and the plaint is rejected, he cannot afterwards file a revision petition against the earlier order refusing leave to sue as pauper and that his remedy is only an appeal against the later order rejecting the plaint which has to be construed as a decree. But in another case reported in *Muniam* v. *Kesava Pandithan*, (1955) 1 M.L.J. 452, which also arose under identical circumstances, Basheer Ahmed Sayeed, J., has differed from Panchapakesa Ayyar, J., and held that the dismissal of the O.P. for non-payment of Court-fee is no bar to the maintainability of a Civil Revision Petition against the original order refusing leave to sue as pauper even though the subsequent order of dismissal has not been challenged in any appeal or revision. A similar question again arose for consideration in S.R.

* S.R. No. 9934 of 1957. 27th September, 1957.

No. 13674 wherein it was held by Ramaswami, J., following *Bommisetti Ramayamma*, In re, (1954) 1 M.L.J. 544 and differing from *Munian* v. *Kesava Pandithan*, (1955) 1 M.L.J. 452, that where the O.P. for leave to sue *in forma pauperis* has been finally dismissed for non-payment of Court-fee within the time allowed, the remedy of the appellant is only to file a regular appeal against the decree rejecting the plaint as it is not open to him to file a revision against the order refusing leave (vide *Venkatammal* v. *Muthukrishna Naidu*, (1957) 2 M.L.J. 34 (S.N.) (since reported in (1957) 2 M.L.J. 623). If it is conceded that regular appeal should be filed as aforesaid, it is submitted that the subject-matter of the appeal will be only the Court-fee payable and not the entire claim about the merits of which there has been no pronouncement by the lower Court.

4. In view of the differing views taken as aforesaid, the competency of the present appeal presents considerable difficulty, and the matter is therefore submitted for a decision by Court on the questions raised in paragraph 2 *supra* in regard thereto.

Party in person.

The Court made the following

ORDER†.—This S.R. purports to be filed as a Civil Miscellaneous Appeal against the order of the City Civil Court refusing leave to file a suit *in forma pauperis* on the ground that the appellant is possessed of means.

A preliminary point for determination is whether this is maintainable as a Civil Revision Petition or Civil Miscellaneous Appeal. It has been held by this Court recently that when an application to file a suit in the pauper form is rejected and time is given for the payment of Court-fee and then the Court-fee is not paid within the time prescribed, the remedy of the petitioner is not by way of a revision against the order rejecting the original petition for non-payment of Court-fee but by way of an appeal. The decisions bearing on this subject have been reviewed in my order in (S. R. No. 13074, dated 23rd July, 1957) *Venkatammal* v. *Muthukrishna Naidu*[1], wherein I followed *Bommi Setti Ramayamma*, In re[2] and *Satyanarayana Charyulu* v. *Ramalingam*[3], and dissented from *Muniyan* v. *Kesavan Pandithan*[4]. That case was not allowed to be filed as a Civil Revision Petition and the party was directed to file an appeal if she was so advised.

This case cannot therefore be filed as a Civil Revision Petition. It can be filed only as a Civil Miscellaneous Appeal, which is what the petitioner has purported to do.

The next question that arises is as to the Court-fee chargeable under section 52 of the Court-fees Act, 1955. In regard to this there are three possible views:

The first view is that *ad valorem*, Court-fee is payable as in the suit on the value of the subject-matter of the suit. The argument for this view is neatly summed up in the judgment of Grille, J.C., in *Ganapati* v. *Venkatesh*[5]. This argument has not however been accepted in the Bench decision of this Court in *Kallappa* v. *Kandaswami*[6]. The previous decision of Schwabe, C.J., in S. R. No. 1923 of 1923 set out *in extenso* at pages 423-426 of Satyamurthi Ayyar's Court-Fees Act is followed in the above decision *Kallappa* v. *Kandaswami*[6], and the view of Pollock, A.J.C,. in the above Nagpur case has been preferred to that of Grille, J.C. *vide* also *Appa Rao* v. *Bhagubai*[7]. Where the limitation permits, rejection of plaint does not preclude a subsequent suit on payment of Court-fee and it would be unreasonable in such cases to levy the same *ad valorem* fee on an appeal from the rejection of plaint. It would be impracticable and inexpedient to apply a different rule where a second suit would be barred by limitation because the question whether there is such a bar may then have to be, decided for the purpose of Court-fee.

The second view is that the Court-fee is payable on the amount of Court-fee payable in the suit. Both the Madras and Nagpur decisions cited above related to cases where there was a dispute as to the amount of Court-fee and Court-fee was held payable on the difference between the Court-fee paid and that demanded. Even in such cases, it is possible that a second suit would be barred by limitation and the

† 27th September, 1947.

1. Since reported in (1957) 2 M.L.J. 623.
2. (1954) 1 M.L.J. 544.
3. (1951) 2 M.L.J. 74 (F.B.).
4. (1955) 1 M.L.J. 452.
5. A.I.R. 1935 Nag. 83.
6. (1938) 1 M.L.J. 662 : I.L.R. (1938) Mad. 981.
7. A.I.R. 1948 Nag. 565.

plaintiff may lose his remedy altogether if the order appealed against is allowed to stand. But such considerations have not weighed with their Lordships. There is no case relating to rejection of plaint consequent on refusal of leave to sue *in forma pauperis*.. If the principle of the above decisions can be extended to this case an *ad valorem* fee on Rs. 1,658-25 nP. being the *ad valorem* fee on the amount of claim *viz*., Rs. 22,103 will have to be levied.

The third view is that the subject-matter of the appeal is only the right to seek his remedy on the scheme of deferred payment of Court-fee. Schwabe, C.J., in the Judgment cited above has observed thus :

> " The question is whether this case has to be heard or not and I confess that I had considerable doubt whether it is not more correct to say that the real subject-matter is whether the case is to be heard or not, "

and remarked that if the subject-matter in dispute were not the difference between the two fees, it would be a subject-matter which is incapable of valuation. (*Vide* extract at page 426 of Satyamurthi Ayyar's Court-Fees Act.) This is also the view taken in an earlier Nagpur case, *Govinda* v. *Bansilal*[1]. This view no doubt was not approved of in the Bench decision in *Kaliappa* v. *Kandaswami*[2], (*vide* remark at page 983). But that was with reference to a case where there was a dispute as to Court-fee and the appellant's contention was that he was not at all liable to pay the extra Court-fee demanded for the prosecution of the appeal. In this case the petitioner does not contest the liability to pay Court-fee but seeks his remedy in pauper form. Therefore the third view seems to me to be the one which may be adopted in this case.

In this view the Court-fee payable under section 52 read with section 50 would be Rs. 200.

The Office Note is answered accordingly.

R.M. ——— *Office Note answered.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE RAMASWAMI.

Badrajala Naidu .. *Appellant**.

Madras Court-Fees Act (XIV of 1955)—Appeal against order determining mesne profits—Valuation for purposes of appeal—Civil Procedure Code (V of 1908), Order 20, rule 12—Decree for mesne profits under—If a final order.

An order in a suit determining the quantum of mesne profits payable subsequent to the filing of the suit will amount to a final decree within the meaning of Order 20, rule 12, Civil Procedure Code and as such in an appeal against such an order the Court-fee has to be computed on *ad valorem* basis depending on the amount of mesne profits in dispute in the appeal.

Balarama Naidu v. *Sangan Naidu*, (1921) 42 M.L.J. 184 : I.L.R. 45 Mad. 280 and *Dharmdhari Prasad Pande*, In re, A.I.R. 1933 Pat. 694, followed.

Section 47, Civil Procedure Code, has no application in such matters and no Civil Miscellaneous Appeal could lie against such orders to the High Court. In suitable cases a revision may lie under section 115, Civil Procedure Code.

Appeals sought to be preferred against the Orders of the Court of the Subordinate Judge of Vellore, dated 9th March, 1957 and made in A.S. Nos. 91 and 90 of 1957 preferred against the Orders of the Court of the District Munsif of Arni in O. E. A. Nos. 311 and 379 of 1956 respectively in O.S. No. 632 of 1940.

The matter was placed before His Lordship for Orders with the following Office Note:

Note for Orders of Court:—These S.R. Numbers are connected with S.R. Nos. 18969 and 18970 and arise from the proceedings of the lower Court appointing a Commissioner for enquiry into waste committed by the respondents and for ascertainment of future mesne profits respectively under Order 20, rule 12, Civil Procedure Code. An order for appointment of a Commissioner is not one of the Orders appealable under Order 43, rule 1. The Lower Appellate Court has however entertained an appeal under the latter provision and dismissed them and the present C.M.S.As. are sought to be filed against the order of the lower appellate Court.

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1. A.I.R. 1927 Nag 100. 2. (1938) 1 M.L.J. 662 : I.L.R. (1938) Mad. 981

* S.R. Nos. 18960 and 18971 of 1957. 30th August, 1957.

It is submitted that if the order is regarded as appealable under Order 43, rule 1, there can be only one appeal therefrom under section 104, Civil Procedure Code, which having been exhausted in the present cases, there will be no further appeal available to the aggrieved party and only a Revision Petition appears competent against each of the impugned Orders. The Advocate for the Appellant contends that the matter falls under section 47, Civil Procedure Code and that C.M.S.As. would lie against the orders of the lower Appellate Court. But he has not cited any authorities covering this question. As the maintainability of these C.M.S.As. is also not free from doubts, these two S.R. Numbers are also submitted for orders of Court as to whether they can be taken on file and numbered as C.M.S.As.

M. A. Rajagopalan and *V. R. Nagarajan*, for Appellant.

The Additional Government Pleader (*K. Veeraswami*), on behalf of the State.

The Court made the following

ORDER.—This reference arises out of the Office Note relating to S. R. Nos. 18960 and 18971 of 1957.

The facts are : These S.R. Numbers are connected with S.R. Nos. 18969 and 18970 which are being dealt with separately and arise from the proceedings of the lower Court appointing a Commissioner for an enquiry into the waste committed by the respondent and for ascertainment of future mesne profits respectively, under Order 20, rule 12. This order for appointment of a Commissioner, I need not point out is not one of the orders appealable under Order 43, rule 1. The lower appellate Court entertained however an appeal under the latter provision and dismissed it. Thereupon these C.M.S. As. are being sought to be filed against the order of the lower appellate Court.

These S.R. Numbers cannot be allowed to be filed as C.M.S.As. at all, and if so advised, they can be filed only as revision petitions. Here are my reasons:

First of all assuming for the sake of argument that the order is appealable, there can only be an appeal therefrom under section 104 and this appeal has already been exhausted. Therefore there is no further appeal available to the aggrieved party. Only revision petitions will be competent as against the orders impugned. This argument is, of course, based on the assumption that an appeal is a proper remedy and it is mentioned only in the circumstances of this case to show that in any event a second appeal cannot be preferred.

In reality the real contention of the learned advocate is this matter falls under section 47, Civil Procedure Code, and that therefore these C.M.S. As. would lie against the orders of the lower appellate Court, and for this position he relied upon *Balaramcharya* v. *Chidambaragouda*[1].

Learned Government Pleader points out that this decision is not applicable to the facts of this case, because as pointed out in the very judgment, the correct procedure under the present Code is for the Court to direct an inquiry as to the mesne profits, and then pass a final decree for the amount found due on the inquiry.

Now a grievance of this nature is covered exactly by Order 20, rule 12, which runs as follows :—

"Where a suit is for the recovery of possession of immoveable property and for rent or mesne profits, the Court may pass a decree..........(c) directing an inquiry as to rent or mesne profits from the institution of the suit until (1) delivery of possession to the decree-holder, etc."

It has been laid down by a Bench decision of this Court in *Balarama Naidu* v. *Sangan Naidu*[2], that an order determining the amount of mesne profits payable subsequent to the filing of a suit is a final decree within Order 20, rule 12 (2), Civil Procedure Code ; and *ad valorem* Court-fee is chargeable under Article 1 of Schedule I of the Court-Fees Act calculated on the amount of mesne profits in dispute in appeal.

The Patna High Court has gone even further. In *Sideshwari Prasad* v. *Ram Kumar Rai*[3], it has been held that an appellant has to pay *ad valorem* Court-fee on the amount for which he seeks to avoid liability or for the amount by which he

1. A.I.R. 1938 Bom. 320. 280.
2. (1921) 42 M.L.J. 184 : I.L.R. 45 Mad. 3. A.I.R. 1933 Pat. 694.

seeks to enhance the value of the appeal and the rule applies to all appeals from decisions determining the amount of mesne profits, whether the profits may have accrued before suit, or after the date of the institution of the suit; the decision in *Dhanukdhari Prosad Pande*, In re[1], was followed.

Therefore, I am unable to hold this matter falls under section 47 and that C.M.S. As. would lie against the orders of the lower appellate Court.

Therefore it is left open to the petitioners to prosecute these S.R. Numbers treating them as C.R. Ps. if so advised against the trial Court's orders with petitions to excuse delay.

R.M. ——— *Office Note answered.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE RAMASWAMI AND MR. JUSTICE SUBRAHMANYAM.

Marudakkal and another .. *Appellants**

v.

Arumugha Goundar .. *Respondent.*

Hindu Succession Act (XXX of 1956), section 14—Construction—Suits by reversioners filed prior to the commencement of the Act for declaration that alienation by widow was not binding—How far maintainable after the Act.

Where prior to the commencement of the Hindu Succession Act (XXX of 1956) a limited owner in possession of her husband's estate had alienated certain items of properties and the alienee was in possession of those items on the date of the coming into force of the said Act, and the reversioner to the estate of the last male owner had filed a suit for a declaration that the alienation will not bind the reversioner and had obtained a decree to that effect and an appeal against that decree was pending on the date when the Act came into force.

Held, that section 14 of the Act had not the effect of converting the alienees title to the alienated items into an absolute and indefeasible title, and that the suit that had been filed by the reversioner had not ceased to be maintainable by virtue of the coming into force of the Act.

Object and scope of section 14 discussed. *Venkayamma* v. *Veerayya*, (1956) 2 An. W.R. 988 and *Gostha Behari* v. *Haridas Samanta*, A.I.R. 1957 Cal. 557, followed.

Chidambaramma v. *Hussainamma*, (1915) 29 M.L.J. 546 : I.L.R. 39 Mad. 565, held not to be good law after *Natwarlal* v. *Dadubhai*, (1954) 1 M.L.J. 69 : (1954) S.C.J. 34 : 1954 S.C.R. 339 (S.C.).

Appeal against the decree of the Court of the Subordinate Judge (Second Additional) Coimbatore, in Original Suit No. 150 of 1949 and dated 27th November, 1952.

T. R. Ramachandran, for Appellants.

D. Ramaswami Ayyangar, for Respondent.

The Judgment of the Court was delivered by

Subrahmanyam, J.—This is an appeal from the judgment and decree of the Subordinate Judge of Coimbatore in O.S. No. 150 of 1949. The defendants are the appellants.

The suit was for a declaration that the sale Exhibit B-7 by the first defendant in favour of the second defendant was not binding on the reversioners to the estate of the first defendant's husband Thanga Goundan. He died in June, 1944. The plaintiff is Thanga Goundan's brother's son. It is not denied that he is the presumptive reversioner to Thanga Goundan's estate. The property sold was a house in Coimbatore. It was sold for Rs. 7,000. The learned Subordinate Judge held that the sale was not binding on the reversioner and hence passed a decree.

The defendants pleaded that the house was the self-acquired property of the first defendant and that even if it formed part of the property inherited by her from her husband, the sale was for necessity binding on the reversioners. On

1. A.I.R. 1933 Pat. 188.

* Appeal No. 844 of 1953. 15th November, 1957.

both the points, the learned Subordinate Judge recorded findings against the defendants.

The first point for determination is whether the property was purchased by the first defendant out of her own funds and for her own benefit benami in the name of her husband Thanga Goundan. The sale-deed Exhibit B-8, dated 2nd September, 1936, was for Rs. 500. The consideration consists of three sums of Rs. 350, Rs. 100 and Rs. 50 reserved with the vendee to discharge certain debts due by the vendor to certain named creditors. Exhibit B-22, the account-book maintained by Thanga Goundan shows that these creditors were paid by him. The first defendant seeks to prove that the moneys which her husband paid were her moneys. In corroboration of her evidence on that point, she relies on the fact that she deposited in 1930 Rs. 500 in the Selva Vridhi Bank. Exhibits B-16 and B-17 show, however, that the deposit was completely withdrawn by her on 18th June, 1931. The fact that she had Rs. 500 in 1931 does not necessarily lead to the inference that she was keeping that sum with her somewhere, for investment for the purchas in 1936. It is true that her husband Thanga Goundan was adjudged an insolvent in 1925. The adjudication was annulled in 1933. Exhibit B-4, a mortgage executed by Thanga Goundan in 1937, shows that he had borrowed Rs. 400 in 1934 on a promissory note. The mortgage was executed in discharge of the debt due on the promissory note. It is the first defendant's own case that four persons contributing moneys as shareholders started a bank in 1931 and placed the first defendant's husband in charge of the bank. He was being paid remuneration by way of bonus on profits. On 23rd May, 1936, he was paid Rs. 300 as bonus. The bank was housed in a part of Thanga Goundan's residential house in Kattur. The bank paid Rs. 40 per annum as rent. On 23rd May, 1936, Rs. 50 was paid to Thanga Goundan as arrears of rent. The evidence stated above makes it clear that Thanga Goundan had assets of his own out of which the house now in dispute could have been purchased by him for his own benefit in 1936.

The presumption that the house was purchased for his benefit, arising from the fact that the sale-deed stands in his name is strengthened by the circumstance that Exhibit B-7 itself in tracing the vendor's title to the property, states that her husband had purchased the house on 2nd September, 1936, that he was in enjoyment of it as absolute owner and that she became entitled to the house subsequent to his death.

The sale Exhibit B-7 is dated 25th February, 1949. The plaintiff issued the notices, Exhibit B-2 to the first defendant and Exhibit B-13 to the second defendant in March, 1949, impeaching the alienation as not binding on the reversioners and threatening to take steps to protect the reversioners' interests unless the alienation was acknowledged by the defendants to be not binding on the reversioners. In the reply, Exhibit A-1 given by the second defendant, he said that the house purchased by him belonged to the first defendant as the heir of her husband. The first defendant, however, in the notice sent to the plaintiff (Exhibit B-3) went back on the statement in the sale-deed Exhibit B-7 and set up the present case that the house had been purchased in her husband's name for her benefit.

After the purchase, the house was improved and repaired. Thanga Goundan, as the person managing the Kattur Vyapara Vridhi Sangam was in possession of funds. We have read the evidence relating to the first defendant's claim to have had separate funds of her own. We are not satisfied that she was doing any milk trade on her own account.

We agree with the learned Subordinate Judge in his appreciation of the evidence on the point and find that the property acquired under Exhibit B-7 was acquired by Thanga Goundan out of his own funds and for his own benefit and that the subsequent additions and improvements mad to the property were also made out of his funds and for own benefit.

The next point for determination is whether the sale of the house effected by the first defendant who, at that time hel a woman's estate in the property was

binding on the reversioners to the estate of her husband. The sale-deed Exhibit B-7 is for Rs. 7,000. The consideration consists of four items. The first item is a sum of Rs. 1,145 reserved with the vendee to discharge the debt alleged to be due by the first defendant on the promissory note Exhibit B-10. The second item is Rs. 540 reserved with the vendee to discharge the debt alleged to be due by the first defendant on the promissory note Exhibit B-12. The third item is a sum of Rs. 1,000 alleged to have been received in cash before the date of the sale-deed. The 4th item is Rs. 4,315 paid by the vendee to the vendor before the Sub-Registrar.

Exhibit B-10 is produced as the promissory note executed by the first defendant in favour of Valliakkal on 9th September, 1945, for Rs. 1,000. The promissory note states that the money was received to discharge the debt which the first defendant's husband Thanga Goundan had borrowed from Thangammal. Exhibit B-11 is the receipt granted by Thangammal. It bears a thumb impression described as Thangammal's thumb impression. Thangammal is the plaintiff's sister. D.W. 8 states that Thangammal passed the receipt Exhibit B-11 in favour of the first defendant. If Exhibit B-11 did not bear his sister's thumb impression the plaintiff would undoubtedly have examined her. We find that Exhibit B-11 is genuine, that Thanga Goundan borrowed Rs. 1,000 from Thangammal and that the debt was discharged by the first defendant on 13th September, 1945. It does not follow, however, that, for discharging that debt the first defendant borrowed money from Valliakkal. She is the first defendant's sister. Valliakkal is not examined. The first defendant is the only witness who speaks to the execution of Exhibit B-11. The second defendant states that he paid money to Valliakkal. The inference from the fact that Valliakkal is not summoned or examined is that, if examined, she would not be able to sustain in cross-examination the story that she lent Rs. 1,000 to her sister. We are unable to accept the interested evidence of the defendants as adequate to prove that any money was borrowed by the first defendant from Valliakkal or that any money was paid to her by the defendant.

The second item of consideration is a sum of Rs. 540 reserved with the vendee for payment to Muthukrishna Naidu in discharge of the promissory note Exhibit B-12 said to have been executed in his favour. The second defendant states that she borrowed Rs. 540 from him under the promissory note for effecting repairs to the house. On the questions of the borrowing of the money and of effecting repairs and of repayment of the money, we have only the evidence of the defendants 1 and 2. For ought we know, neither Muthukrishna Naidu nor Valliakkal might be aware of the execution of the promissory notes, Exhibits B-12 and B-10 in their names. If the evidence of the defendants were true in relation to Exhibit B-12 there is no reason why Muthukrishna Naidu is not examined. We consider the interested evidence of D.Ws. 7 and 9 not adequate to prove that the promissory note Exhibit B-12 was executed by the first defendant and accepted by Muthukrishna Naidu or that it was discharged by the second defendant.

The third and the fourth items of consideration are sums received in cash aggregating to Rs. 5,315.

The house was fetching a rent of Rs. 40 per mensem at the time of the sale. The property was converted into cash by the sale in favour of the second defendant. The reason for such conversion stated in the sale-deed is that the first defendant required money in order that she might carry out the commands of her husband that she should undertake pilgrimage to Benares and other holy places and that she should conduct charities for the salvation of her husband's soul and in order that she might have money for her own maintenance in her last days. If the first defendant's husband had asked her to go on pilgrimage or to sell small portions of his property for charitable purposes in order that his soul might attain salvation, it might have been within her rights to make an alienation of an adequate portion of her husband's properties for those purposes. But there is no evidence of the expression of any such wish on the part of her husband. The first defendant herself does not say that her husband had asked her to go on pilgrimages or to perform

charities. Indeed, she does not even say that she intends to go on pilgrimages or to perform charities. The recitals relating to pilgrimages and charities in Exhibit B-7 should in the circumstances be held to be mere words written out to show some kind of cause justifying the alienation as against the claim of the reversioners. Those statements in the sale-deed, relating to charities and pilgrimages, we hold, are false.

The other statement made in the sale deed regarding the need for the alienation is that she needed cash for her maintenance during her last days. The house was fetching a rent of Rs. 40 a month. The portion of the Kattur house which was let out to the Bank was fetching a rent of Rs. 40 per annum. In addition, she had received on 4th September, 1945, Rs. 1948-8-0 paid as compensation by the Government for acquiring some land which had belonged to her husband. She does not say that she would need more than about Rs. 40 per mensem for her maintenance. There was consequently no need for her to sell the house in order to find money for her maintenance.

During trial, the defendants sought to support the alienation on the ground that the sums received in cash had been applied to pay off debts payable by the Kattur Vyapara Vridhi Sangam which was being managed by the first defendant's husband during his lifetime and by the first defendant after his death. In the notice, Exhibit B-3 which the first defendant sent to the plaintiff's advocate on 16th April, 1949, she said,

> "Moreover some shareholders are raising objections stating that Thanga Goundan alone should repay the deposit amount received in the bank at the time when Thanga Goundan was working in the Kattur Vyapara Vridhi Sangam and that the shareholders are not liable. My client does not admit it. She states that the shareholders alone are liable. It has not yet been settled."

That statement was made on 16th April, 1949. The suit which has given rise to this appeal had been instituted on 11th April, 1949. During the pendency of the suit, moneys are said to have been paid by the first defendant to the creditors of Kattur Vyapara Vridhi Sangam out of the sum that had been received in cash from the second defendant. Obviously, such payments could not form effective consideration to support the alienation as against the reversioners. Exhibit B-18, the book maintained by the Bank, shows that one Ramaswami Chettiar, Varadarajulu Mudaliar and the first defendant each contributed Rs. 250 in 1931 towards the share capital of the sangam and that one Venkatachala Konar contributed Rs. 500. It was obviously a partnership formed for the purpose of doing business in banking. The debt payable by the partnership would have to be paid proportionately by the various partners in the event of the assets of the partnership being found inadequate. Exhibit B-7 itself makes it clear that the purpose of the alienation was not payment of any such debts. In any event, the payment by the first defendant of the part of the debts payable by the other shareholders would not bind the reversioners.

We agree with the learned Subordinate Judge and find that the alienation is not supported by necessity and is not binding on the reversioners to the estate of late Thanga Goundan.

The learned Advocate for the appellants takes the plea that by reason of the coming into force of the Hindu Succession Act during the pendency of the appeal, the plaintiff's cause of action to sue for declaration that the alienations are not binding on the reversioners has become extinguished. The appeal will be posted for arguments on that point.

The appeal came on for further hearing on Friday, 25th October, 1957, and on Friday, 1st November, 1957, and the Judgment of the Court was delivered by

*Subrahmanyam, J.**—We have found that the alienation Exhibit B-7 made in favour of the second defendant on 25th February, 1949, by the 1st defendant is not binding on the reversioners to the estate of the first defendant's husband. It is argued that the right of the reversioner to sue for a declaration that an alienation

* 15th November, 1957.

made by a Hindu woman owning a woman's estate is not binding on the reversioners of the estate of that last male-holder has been extinguished by section 14 (1) of the Hindu Succession Act, 1956, and that, after the commencement of the Act no such suit can be maintained.

Section 14 is in these terms :

"(1) Any property possessed by a female Hindu, whether acquired before or after the commencement of this Act, shall be held by her as full owner thereof and not as a limited owner.

. . . .

(2) Nothing contained in sub-section (1) shall apply to any property acquired by way of gift or under a will or any other instrument or under a decree or order of a civil Court or under an award where the terms of the gift, will or other instrument or the decree, order or award prescribe a restricted estate in such property."

In order to be able to return correct answers to questions relating to the applicability of the section to particular situations, it is necessary to know the reasons for the enactment of that section and the purpose which it was intended to achieve. Under the Hindu Law of Succession as it stood before the commencement of the Act, a brother who inherited the property of the father took it as full owner, while the sister who, her brother and mother having pre-deceased her father, inherited his property acquired in it not the full but what is known as woman's estate. The incidents of that estate are that she could not alienate the property except for purposes compendiously described as legal necessity and that on her death the property would devolve not on her heirs but on the heirs of her father. It was not that she was under an obligation to preserve the estate for her father's heirs or that, during her lifetime, any other person had any interest in the property. The limitations upon her estate were the very substance of its nature and were due solely to her sex. Students of Hindu Law are familiar with the text attributed to Brhaspathi (on another topic in Hindu Law).

"He, who, having received a sum lent or the like, does not repay it to the owner, will be born hereafter in the creditor's house a slave, a servant, a woman or a quadruped."

No one need cavil at the sage who in that passage, placed women alongside slaves and quadrupeds, any more than a person with a sense of history, would make an adverse comment that so wise a philosopher as Aristotle, defended slavery on the ground that some men were slaves by nature and indeed held that servitude had its compensations. What is material is that Hindu society has had a new birth of freedom. The new ideals that have governed social development in India in recent times have given a permanent habitation in the Preamble to the Constitution of India, which, as regards women, assures them of equality of status and of opportunity with men. Therefore, when Parliament, acting in the exercise of its powers under the Constitution, enacted a Law of Hindu Succession, Parliament freed women from the disability which, compared with men, women suffered from in relation to the holding of and title to, property. The reason for the enactment of section 14 (1), therefore, was to ensure to women equality of status and of opportunity with men in relation to title to, and enjoyment of, property. That equality was the sole aim of section 14 (1) is placed beyond doubt by sub-section (2), which states that sub-section (1) would not apply to limitations imposed by the grant where property held by a Hindu woman has been acquired under a grant. A Hindu male acquiring property under such a grant would take the property subject to the limitations. The principle of equality does not demand that a Hindu woman should be placed in a better position. That is the substance of section 14 (2) which, thus, emphasises that equality of men and women is the keynote of section 14 (1). To stretch section 14 (1) to cover a case which is not within its language and which lies outside its purpose (namely, the purpose of freeing Hindu women from the fetters imposed on them by the earlier law in relation to the enjoyment of property), would be to act in violation of correct rules of construction.

We have now to proceed to examine the terms of section 14 (1) in greater detail, to ascertain if it could be extended to property held by an alienee from

a Hindu woman under an alienation made before the commencement of the Act. The section says

"Any property possessed by a female Hindu....shall be held by her as full owner thereof and not as a limited owner."

The section would apply obviously to property inherited by a female Hindu subsequent to the commencement of the Act. But, at the commencement of the Act, there were a large number of Hindu women in the country who held property which they had inherited before the commencement of the Act. Would they also hold such property after the commencement of the Act as full owners instead of as limited owners as they had done till then? Even if the section contained only the words "Any property possessed by a female Hindu shall be held by her as full owner thereof and not as a limited owner," the section would apply to property which had been acquired by a Hindu woman before the commencement of the Act, provided it was in her possession at the commencement of the Act. Every Act speaks with effect from the date of its commencement. Therefore, the words "property possessed" occurring in the section would apply to property possessed at the commencement of the Act, that is to say, to property acquired before the commencement. But, with a view to obviate argument and litigation on that matter, the Legislature wisely introduced the clause "whether acquired before or after the commencement of the Act." The Legislature thereby made it clear that the section applied also to property which a Hindu woman had inherited before the commencement of the Act provided it was in her possession at the commencement of the Act. To that extent, the section is retrospective. But the section is not retrospective in the full sense of the term, because the operation of the section does not extend to any period before the commencement of the Act. The operative words are 'property....shall be held....as full owner'; that is to say, full ownership is had in the future. Property possessed at the time of the commencement of the Act is, with effect from the date of such commencement, held in full ownership. Section 14 (1) does not say that property possessed by a woman on the date of the commencement of the Act shall be deemed to have been acquired or held by her as full owner with effect from the date on which it was acquired or with effect from any date anterior to the commencement of the Act. Section 14 (1) is not, in that sense, retrospective.

We have now to consider whether section 14 (1) can have any effect on property possessed by an alienee under an alienation made by the Hindu woman before the commencement of the Act. So as to keep the discussion close to facts, let us use an illustration. A Hindu woman *W* inherits, let us say, from her husband, immoveable properties worth a lakh of rupees. She considers it difficult to manage them and realise the income and therefore resolves to convert the property into cash and go and live with a relation, say *D*, her sister's daughter. She sells the property to an alienee, say *A*, (a male Hindu) for Rs. 30,000 and spends the rest of her days, with that money, as a member of *D*'s family. The arrangement suits the convenience of all the three parties, *W*, *A* and *D*. But it is clear that, on the date of the alienation, which was, let us say, in 1950, *W* and *A* knew that the property was not sold for "legal necessity" and that the alienee or his representative would hold the property after *W*'s lifetime, at the pleasure of the reversioners to her husband's estate. The question is whether section 14 (1) serves to augment the rights held by *A* in the property, into rights of full ownership.

The nature of the interest acquired by *A* under the alienation which we have described above, is defined, if we may say so with respect, in terms of the utmost precision by the Supreme Court in *Natvarlal* v. *Dadhubhai*[1]:

"The Hindu Law certainly does not countenance the idea of a widow alienating her property without any necessity, merely as a mode of enjoyment......If such a transfer is made by a Hindu widow, it is not correct to say that the transferee acquires necessarily and in law an interest commensurate with the period of the natural life of the widow or at any rate with the period of her widowhood. Such transfer is invalid in Hindu Law but the widow, being the grantor herself, cannot derogate

1. (1954) 1 M.L.J. 69, 77: (1954) S.C.J. 34: 1954 S.C.R. 339 (S.C.).

from the grant and the transfer cannot also be impeached so long as a person does not come into existence who can claim a present right to possession of the property. As in the majority of cases, persons with such rights come into existence only when the widow dies it is generally said that the alienee gets the estate for the term of the widow's life".

Let us suppose that *W*, *A* and *D* in the illustration given above were alive when the Hindu Succession Act came into force in 1956. The property alienated by *W* and possessed by *A* is not within the language of section 14 (1). Nor does an enlargement of the interest owned by *A* in the property form any part of the purpose sought to be achieved by the enactment of section 14 (1). The purpose of the section is merely to free Hindu women from the fetters imposed on them by the earlier Hindu Law in relation to the holding and enjoyment of property. No such purpose would be served by enlarging the interest which *A* acquired under the alienation which *W* had made. To say that the effect of section 14 (1) is to make him full owner of the property would be to say that Parliament intended to make him the object of its bounty in the sum of Rs. 70,000.

The argument in support of the contention that *A*'s interest in the illustration given above gets enlarged to full ownership is put, first, in the following way. By alienation, *A* acquired *W*'s right to enjoy the property for her lifetime. He did not acquire the reversionary interest. The reversionary interest continued to vest in *W*. If she had not alienated the property but had remained in possession, she could, after the commencement of the Act, transfer full ownership to *A*, if such was her pleasure receiving only Rs. 30,000. By virtue of the Act, the reversionary interest which she retained gets transferred to *A*. Let us examine that argument. The first link in that chain of reasoning is that the property in the hands of *W* was divisible into two parts, one part consisting of her right to enjoy the lands and buildings for her lifetime and the other part consisting of the reversionary right of enjoyment after her death, and that, under the alienation, she sold the first part and retained the second part. That argument finds some support in the judgment of this Court in *Chidambaramma* v. *Hussainamma*[1]. In that case, there was an alienation by a widow for purposes not binding on the reversioners. A creditor of the last male holder, who had obtained a decree against the widow on a debt incurred by the last male-holder, attached and brought to sale the reversionary interest said to remain in the widow after the alienation. Sadasiva Ayyar, J., held :

"When the full estate is vested in her and yet owing to the restrictions which from being moral restrictions have become legal restrictions, she can convey only an interest to last during her lifetime by a conveyance not for legal necessity, it seems to me to follow that the absolute estate vested in her becomes by her alienation for her own purposes (valid during her lifetime) divided into two estates (1) a life-estate enjoyable by the purchaser during her life-time and (2) a reversionary estate to be enjoyed after her lifetime, both of which estates or rather the total of which belonged to her husband at his death. So far as her life interest is concerned, it became by her alienation not available to the creditors of her husband ; but the ownership of the remaining reversionary estate continues in her as part of the estate which she inherited from her husband. That seems to me to be available to her husband's creditors ".

That view of this Court as to the divisibility of the estate denoted by the term woman's estate was dissented from by Sulaiman, J., in *Lakhmi Chand* v. *Lachho*[2]. The observations of Sulaiman, J., were endorsed by the Supreme Court in *Natvarlal* v. *Dadubhai*[3]. Their Lordships state :

" Sulaiman, J.,........enunciated the law with perfect precision when he said that the effect of an alienation by a widow is not to split up the husband's estate into two parts or to give to the alienee an interest necessarily co-extensive with her lifetime. The reversionary right to challenge it is no part of the widow's estate at all ".

On that point therefore, the law can no longer be said to have been correctly stated in *Chidambaramma* v. *Hussainamma*[1]. In view of the statement of the law made in *Natvarlal's Case*[3], *A*, in the illustration we have given in the preceding paragraphs, acquires no interest in the property, but merely a right of enjoyment

1. (1915) 29 M.L.J. 546 : I.L.R. 39 Mad. 565, 568.
2. (1926) I.L.R. 49 All. 334, 347.
3. (1954) 1 M.L.J. 69, 78 : (1954) S.C.J. 34 ; (1954) S.C.R. 339 (S.C.).

based on *W*'s disability to derogate from the grant. It would seem to follow that the right of the creditor considered in *Chidambaramma* v. *Hussainamma*[1], was to attach the property as the property of the last male holder and to bring the property to sale to satisfy the debt owed by him. On the alienee's objection to the attachment, equities might be worked out to the extent considered just and proper. But since situations of that kind are likely to be of rare occurrence in the future, nothing further need be said on that topic in this judgment. We are dealing at present with the argument advanced on behalf of the alienee that the woman's estate is divisible into two parts, and that, in the case of an alienation not binding on the reversioner, the part which entitles her to enjoyment during her lifetime is alienated and the reversionary interest continues to vest in her and gets transferred to the alienee by the operation of section 14 (1) of the Hindu Succession Act. We have seen how brittle is the first link in that chain of reasoning, namely, that the woman's estate is capable of division into two parts. But even if it were capable of division into two parts, and even if the second part, namely, the reversionary interest remained vested in her prior to the commencement of the Act, it is difficult to see how that interest could get transferred to the alienee by the operation of section 14 (1) of the Act.

The next argument advanced on behalf of the alienee is that, since the widow purported to transfer full ownership and she had power to transfer full ownership for legal necessity, and since, if the property had remained in her possession at the commencement of the Act, she would have become full owner of the property, full ownership must, by the operation of the Act be deemed to have been transferred to the alienee. In so far as the argument can be founded on principle, reference can be made only to section 43 of the Transfer of Property Act. Section 43 enacts :

> "Where a person........erroneously represents that he is authorised to transfer certain immoveable property and professes to transfer such property for consideration, such transfer shall, at the option of the transferee, operate on any interest which the transferor may acquire in such property at any time during which the contract of transfer subsists."

In the illustration given in the preceding paragraphs, neither *A* nor *W* could have been under any misapprehension as to the nature of the interest which *W* could transfer to *A*. The property had been inherited by her as the heir of her husband. She owned only a woman's estate and could not validly transfer full ownership for the reasons stated in the instrument of transfer. Even if the facts relating to consideration were different and both parties believe that the consideration paid was effective in law to transfer full ownership, but it is declared subsequently by a Court of competent jurisdiction that the transfer was not binding on the reversioners, it cannot be said that there was any representation on the part of the woman, which the alienee, unaware of its truth or effectiveness, acted upon. The first part of section 43 relating to erroneous representation cannot therefore be brought into play in the case of an alienation by the holder of a woman's estate, which is not binding on the reversioners. The second part of section 43 requires that, subsequent to the transfer, the woman acquires an interest in the property which she did not own at the time of the transfer. Section 14 (1) of the Hindu Succession Act does not deal with property which was not in the possession of, or which was not held, by the Hindu women at the time of the commencement of the Act. Therefore, the ground of subsequent acquisition of title is not available for enlargement of the title previously acquired. There is no other principle that could be invoked in support of the position that section 14 (1) which was intended to remove the woman's disability could enure for the benefit of an alienee.

It is argued t at section 14 (1) abolishes the system of reversioners and that therefore, after the commencement of the Hindu Succession Act, no suit by a Hindu reversioner for a declaration regarding an alienation by the limited owner can be maintained. What section 14 (1) states is that property possessed by a female

1. (1915) 29 M.L.J. 546 : I.L.R. 39 Mad. 565, 568.

Hindu shall be held by her as full owner and not as a limited owner. In relation to such property, she becomes a fresh stock of descent and therefore there can be no question of reversion to the estate of the last male holder. Reversion gets abolished as a consequence of the estate being enlarged to full ownership. Therefore, unless the alienee's interest also gets enlarged to full ownership by the operation of section 14 (1), it would not be correct to speak of reversion in relation to such alienated property getting abolished. The first question to ask is, does the alienee's interest get enlarged and does he become a fresh stock of descent? If that question is answered in the affirmative, it would follow as a consequence that there could be no reversion to the last male holder's estate in relation to that property. To say that there is no reversionary interest and then to proceed to consider the rights of the alienee is to look at the problem from the wrong end of the telescope and therefore to get incorrect answers. The nature of the interest acquired by an alienee from a female Hindu gets fixed on the date of the alienation. In a case where the alienation is not binding on the reversioners to the estate of the last male holder, the interest which the alienee gets is the right not to have the alienation impeached by the woman and to hold the property at the pleasure of the reversioners on the termination of the woman's estate. That interest of the alienee is not affected either to his advantage or to his prejudice by section 14 (1).

It is argued that if the alienee's interest does not get affected and the property in his hands is liable to devolve on the heirs of the last male holder on the termination of the woman's estate, then, if the woman is on the date of the commencement of the Act in possession of property which she had inherited from the last male holder and dies without alienating them, the result would be that those properties would devolve on her heirs, while the properties alienated by her before the commencement of the Act would devolve on her husband's heirs, in a case where the two sets of heirs are different. But that is a consequence which followed from Parliament leaving untouched, properties in the hands of the alienees, while dealing beneficently with properties which are in the possession of the woman, at the commencement of the Act. Where, for example, there is a single mortgage-debt owing by an agriculturist and a non-agriculturist and the Legislature of a State enacts a law requiring scaling down of the debt as regards the agriculturist, different sums become payable by the debtor in relation to the same indivisible mortgage. Such results cannot be called anomalies where they are the consequences of competent legislative policy.

We should like to add that our conclusions have not been influenced in any manner by the use of the word 'possessed' in section 14 (1). In the appeal under consideration and in the illustration which we have given in the preceding paragraphs, the property was in the possession of the alienee at the commencement of the Act. But in order that the woman should get the benefit of section 14 (1) it is not necessary that the property should be in her physical possession at the commencement of the Act. If, for example, the property was in the possession of a trespasser at the time of the last male holder's death and the trespasser had not perfected his title by adverse possession when the Act came into force, the property would be inherited by the female Hindu. She would hold in it a woman's estate, though she was not in possession of the property. Her interest gets enlarged by section 14 (1) into full ownership, although she is not in possession. If, instead of filing a suit against the trespasser for possession, she decides to sell the property she could sell it as full owner and her vendee could sue the trespasser for possession of the property. The word 'possessed' and the word 'held' used in section 14 (1) mean one and the same thing and the little controversy that has centred round the word 'possessed' would have been avoided, if the parliamentary draftsman had used the same word 'held' in both places. Our view that the alienee in the case under appeal did not have his rights in the property enlarged to full ownership by section 14 (1) is not based on the fact that he was in possession of the property on the date of the commencement of the Act, but on the facts that the property is not within the language of section 14 (1) and that an enlargement of the alienee's interest does not form

any part of the purpose sought to be achieved by its enactment. As the relevant latin maxim puts it, the sense and reason of the law is the soul of law.

We agree with respect with the views expressed in *Venkayamma* v. *Veerayya*[1], and *Gostha Behari* v. *Haridas Samanta*[2], and with respect, are unable to adopt the conclusions reached in *R. A. Missir* v. *Raghunath*[3]. We hold that there is nothing in the Hindu Succession Act, which affects the maintainability of the respondent's suit.

The appeal is dismissed with costs.

K.S. —————— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. P. RAJAGOPALAN, *Officiating Chief Justice* AND MR. JUSTICE RAJAGOPALA AYYANGAR.

M. A. Muthiah Chettiar .. *Petitioner**

v.

Sa. Ganesan and another .. *Respondents.*

Representation of the People Act (XLIII of 1951, as amended by the second Amendment Act XXVII of 1956), sections 81 and 90 (1)—Powers and jurisdiction of Election Tribunal—Amendment introducing new facts applied for after expiry of period prescribed for filing petition—Order allowing—Jurisdiction—Interference by writ of certiorari.

Constitution of India (1950), Article 226—Interlocutory orders—Interference—Powers of High Court—Election tribunal refusing to decide certain issues as preliminary issues—Interference by writ of prohibition—Principles—Existence of another remedy by way of appeal—If bar to interference by writ.

The power and jurisdiction of the Election Tribunal constituted under the Representation of the People Act, 1951 (as amended by Act XXVII of 1956) are not plenary, but limited, and the tribunal has to function within the limits set to it by the Act, it being a creation of the Act. The jurisdiction to allow amendments which it has, by reason of the application of the provisions of the Code of Civil Procedure, 1908, to the trial of election petitions is, by section 90 (1) of the Act, as amended in 1956, " subject to the provisions of this Act ", which includes section 81, which prescribes the period of limitation within which an election petition has to be filed. The power of the Election Tribunal to order amendment by invoking the provisions of Order 6, rule 17, Civil Procedure Code, is, thus subject to this limitation prescribed by section 81. Where therefore, by amendment, a party applying for it seeks to allege a new fact and not merely to explain or clarify a material fact already stated, as a ground for setting aside the election, the same cannot be allowed if the application therefor is made after the period prescribed by section 81 for filing a petition has elapsed. An order allowing an amendment in such cases would be beyond the jurisdiction of the tribunal and is liable to be quashed by the High Court by a writ of *certiorari* especially where it is also vitiated by an apparent error.

Harish Chandra Bajpai v. *Triloki Singh*, (1957) S.C.J. 297, applied.

The fact that the order is an interlocutory order and that there is another remedy open by way of appeal under section 116-A of the Act would not be a bar to the issue of a writ.

Article 226 of the Constitution is couched in the widest terms and is not confined to final orders and there is no statutory or constitutional bar to the exercise of the High Court's powers under Article 226. Though the existence of a provision for an appeal is certainly a material factor, to be taken note of, it is not determinative.

Similarly where the High Court is satisfied that an order of the election tribunal as to the order in which the issues are to be tried and refusing to try certain issues as preliminary issues, is an erroneous order which, if allowed to continue in force, would enlarge the inquiry by evidence which at a later stage would have to be discarded, the High Court will interfere and issue a direction to the tribunal to try certain issues as preliminary issues before embarking upon an inquiry on the other issues and the merits. The policy of the Representation of the People Act, which is to have an expeditious disposal of election petitions would be frustrated if the erroneous order of the election tribunal in such a case is not set aside. The fact that the determination of the matter covered by the issues to be tried as preliminary issues involve difficulty can be no justification for the tribunal to put off this consideration. It would be improper and illegal for the tribunal to postpone the determination of those issues on such grounds.

Maude v. *Loscley*, (1874) L.R. 9 C.P. 165, 172 and *Charan Das* v. *Amir Khan*, (1920) 39 M.L.J 195 : L.R. 47 I.A. 225 (P.C.), referred to.

1. (1956) 2 An. W.R. 988.
2. A.I.R. 1957 Cal. 557.
3. A.I.R. 1957 Pat. 480.

* W.P. Nos. 611 and 668 of 1957. 21st October, 1957.

Petition praying that in the circumstances stated in the affidavit filed therewith the High Court will be pleased to issue a writ of prohibition prohibiting the Second Respondent herein from proceeding with the trial and disposal of the Election Petition No. 86 of 1957 on its file.

M. K. Nambiar, K. K. Venugopal and *V. M. Venugopala Menon,* for Petitioner.

S. Mohan Kumaramangalam, for 1st Respondent.

The Order of the Court was pronounced by

Rajagopala Ayyangar, J.—These are petitions for the issue of writs of *prohibition* and *certiorari* respectively and arise out of the Election Petition No. 86 of 1957 on the file of the Election Tribunal Madurai.

The Election Petition (No. 86 of 1957) was for setting aside the election of the petitioner Sri Muthiah Chettiar to the Madras State Assembly from the Karaikudi Constituency in Ramanathapuram district. At the election to this Constituency held on 1st March, 1957, Sri Muthiah Chettiar whom we shall hereafter refer as the petitioner, and Sri Sa. Ganesan (to be referred to as the respondent) were the main contesting candidates. As many as eight persons filed nominations for the seat and four withdrew their nomination papers and the other four went to the polls. The petitioner was declared elected on 5th March, 1957 as having obtained 24, 223 votes as against 23,365 votes secured by the respondents. The two other candidates obtained a very small number of votes and they might be ignored for the purpose of these proceedings. On 15th April, 1957, the respondent filed the Election Petition numbered as E.P. No. 86 of 1957, and the only prayer that it contained was for a declaration that the election of the returned candidate was void. To a petition containing such a prayer the only party necessary to be joined as respondent was, under the terms of section 82 (*a*) of the Representation of the People Act, the returned candidate, and the present petitioner was therefore the only respondent to this Election Petition.

The grounds upon which the election was sought to be set aside were mainly two: (1) that the petitioner had on the date of his election an interest in a subsisting contract with the State Government which disqualified him for standing for election under section 7 (*d*) of the Act ; (2) that the petitioner was guilty of several acts of corrupt practices which were set out in several paragraphs of the petition. The respondent therefore pleaded that the election of the returned candidate was liable to be declared void under section 100 (1) (*a*), (*b*) and (*d*) of the Representation of the People Act (hereafter referred to as the Act). The Election Commission referred this petition to the Election Tribunal, Madurai, under section 86 of the Act.

After the receipt of this petition, the Tribunal posted the petition to 22nd June, 1957 for the appearance of the returned candidate who was the sole respondent to the Election Petition. The petitioner thereupon appeared and filed I.A. No. 1 of 1957. In this application the petitioner prayed that the Tribunal might strike out the following:—

"Paragraphs 13 (1) (*a*), (*b*), (*c*), (*d*), (*e*), (*g*), (*h*) (i), (*h*) (ii), (*i*), (*j*), (*k*), (*l*), 13 (2) (*a*), (*b*) (*c*), 14 (*b*), 15 (*b*) and 17 of the Election Petition, as not coming within section 100 (1) (*b*) of the Act.

(2) Paragraphs 12, 13 (1) (*a*), (*b*), (*c*), (*e*), (*f*), (*g*), (*h*) (i), (*h*) (ii), (*i*), (*j*) and (*k*) of the Election Petition, as not amounting to corrupt practice of undue influence coming under section 123 (2) of the Act.

(3) Paragraphs 13 (2) (*a*), (*b*) and (*c*) of the Election Petition as not amounting to the corrupt practice of bribery under section 123 (1) of the Act.

(4) Paragraph 17 of the Election Petition and Schedule III (A) as not amounting to the corrupt practice of procuring the services of Government servants under section 123 (7) of the Act and

(5) paragraph 8 of the Election Petition as not coming under section 100 (1) (*d*) (iv) of the Act",

on the ground that even if proved they would not amount "to corrupt practice" within the relevant provisions of the Act. The respondent filed a counter affidavit denying this interpretation of the petition read with the provisions of the Act. He therefore prayed that the petition might be dismissed. I.A. No. 1 of 1957 was heard by the

Tribunal and orders thereon passed on 14th July, 1957. The net result of this order was that the points raised in I.A. No. 1 of 1957 were left undecided and were reserved "for being dealt with as occasion arose during the trial of the petition". W.P. No. 611 of 1957 is directed to question the legality and propriety of this order and the relief sought in the petition is a writ of prohibition preventing the Tribunal from proceeding further with the trial of the Election Petition.

We shall refer to the details of the contentions raised in W.P. No. 611 of 1957 after setting out the matters which have given rise to W.P. No. 668 of 1957. In the course of the order on I.A. No. 1 of 1957 the Tribunal recorded :

"In the course of the arguments Sri Mohan Kumaramangalam indicated that certain objections raised on behalf of the applicant could be got over by amendment of the Election Petition under Order 6, rule 17 of the Code of Civil Procedure".

This matter was further referred to in a later portion of the order in these terms :

"The respondent in the election petition will file his written statement on Wednesday the 24th instant. The election petitioner should if he desired to amend the petition make an application in that behalf on or before that date and that application will be considered that day. Issues will be settled on the 27th. Parties are directed to file on or before 27th such of the documents as would be material or useful in the matter of settling the issues".

In pursuance of this order in these terms the petitioner filed his written statement on 24th July, 1957. In this written statement the objections formulated by the petitioner in I.A. No. 1 of 1957 were reiterated. The petitioner came forward with a further point that, inasmuch as the Election Petition included charges which did not fall within the definition of corrupt practice which would avoid the election within section 100 (1), the petition itself was not competent and had to be dismissed *in limine* under section 81 read with section 90 (3) of the Act. The written statement which controverted in detail the allegations of fact contained in the election petition, ended with a prayer that the petition might be rejected under section 90 (3) of the Act, for the reason already indicated.

The respondent on his part filed two applications for amendment of the Election Petition I.A. No. 3 of 1957 and I.A. No. 4 of 1957. The amendment sought to be effected by I.A. No. 3 of 1957 fell into two categories. The first group comprised those which were merely clerical in their nature. The other consisted of allegations that the petitioner was disqualified for standing for election under section 7 (*d*) of the Act by reason of his interest in five companies besides the one named originally in the petition which had subsisting contracts with the State Government for the supply of goods execution of works, etc. I.A. No. 4 of 1957 sought to effect amendments in respect of four items. Some of these were particulars of the corrupt practice set out in the petition as grounds for avoiding the petitioner's election. Some were amendments which sought to introduce the words "by the returned candidate or his agents with his consent" in the several paragraphs set out by the petitioner in I.A. No. 1 of 1957, with a view to remedy the defects which were alleged to exist in them. Counter affidavits were filed to these applications by the petitioner and the two applications I.A. Nos. 3 and 4 of 1957 came on for hearing and were disposed of by an order, dated 4th August, 1957. On this same day draft issues were filed by both sides based on the pleadings in the petition, and with some slight amendments, whose correctness is not now challenged, the Tribunal accepted these and framed the issues accordingly. By its order, dated 4th August, 1957, I.A. No. 4 of 1957 was dismissed in regard to the main item namely, the amendments which sought to remove the defects which were said to exist in the Election Petition as filed. Certain other items were allowed and the correctness of the order in I.A. No. 4 of 1957 is not disputed by either side. The Tribunal ordered most of the items of amendment prayed for in I.A. No. 3 of 1957. It may be mentioned that the allowance of some of these items was not objected to by the petitioner, and the only item of amendment allowed whose legality is challenged before us, is in relation to that by which the respondent was permitted to add to the contracts which were said to disqualify the petitioner from standing for election under section 7 (*d*) of the Act. W.P. No. 668 of 1957 is for the issue of a writ of *certiorari* to quash this order of amendment granted in I.A. No. 2 of 1957 by which the items of disqualification were permitted to be introduced into the Election Petition.

Before we pass on to consider the points urged by learned counsel for the petitioner it is necessary to mention one fact in relation to the issues framed and the oral direction of the Tribunal in relation to the consideration of these issues made on 4th August, 1957. The issues relevant in the present context are issues 1 to 8. The other issues which are numbered 9 to 30 relate to matters which would legitimately be the subject of enquiry by the Tribunal if issue 1, which we shall set out immediately, were decided in favour of the respondent. The first issue ran :

1. Is the election petition in conformity with the provisions of (*a*) section 81 and/or (*b*) section 83 of the Representation of the People Act and liable to be dismissed under section 90 (3) or any other provisions of the said Act ?

Issues 2 to 7 comprised matters set out in I.A. No. 1 of 1957 and which, according to the petitioner, the Tribunal had no jurisdiction under the Act to enquire into. For the purpose of better understanding the nature of the objections involved we shall set out these issues :—

2. Do the allegations in paragraph 13 (1) (*a*), (*b*), (*c*), (*e*), (*g*), (*h*) (i), (*h*) (ii), (*i*), (*j*), (*k*), (*l*), 13 (2) (*a*), (*b*), (*c*), 14 (*b*), 15 (*b*) and 17 of the election petition; constitute grounds in law for declaration of the election of the returned candidate, to be void for the reasons stated in paragraph 4 of the written statement ?

3. Do the allegations in paragraphs 12, 13 (1) (*a*), (*b*), (*c*), (*e*), (*f*), (*g*), (*h*) (i), (*h*) (ii), (*i*), (*j*) and (*k*) of the petition constitute corrupt practice of undue influence under section 123 (2) of the Act ?

4. Do the allegations in paragraph 13 (2) (*a*), (*b*) and (*c*) constitute corrupt practice of bribery under section 123 (1) of the Act ?

5. Do the allegations in paragraph 17 and Schedule III-A amount to corrupt practice under section 123 (7) of the Act ?

6. Do the allegations in paragraph 8 of the petition amount to corrupt practice under section 100 (1) (*d*) (iv) of the Act ?

7. Is the petition maintainable in the absence of particulars as contended in paragraphs 12 to 33 of statement of objections ?

Issue 8 ran in these terms :—

8. Should issues 1 to 7 be heard as preliminary issues ?

On 4th August, 1957, when the Tribunal settled these issues, which was the same day on which orders on I.A. Nos. 3 and 4 were passed, an oral application was made by learned counsel for the petitioner to hear issue 8 in the first instance and then, if necessary, issues 1 to 7 and thereafter proceed with the trial of the action. The Tribunal, however, it is agreed, appears to have rejected this suggestion and intimated that the order it had already passed in I.A. No. 1 of 1957 would still be followed, namely, that the matters set out in issues 1 to 7 would not be disposed of as preliminary issues but would be dealt with only as occasion arose in the course of the trial or at the end of the trial. After having given this oral direction the Tribunal passed the following order :

" The respondent will file his written statement if any in respect of the amendments to the petition allowed by this order and the petitioner will, as required on behalf of the respondent, supply further particulars of the contracts with particulars of dates and other details.

Mr. Sastriar wants a week's time for that purpose. Posted to 12th. The respondent will file his written statement on the 17th. Issues settled. Examination of witnesses will start at 7 A.M. on 17th ".

The grievance of the petitioner is as regards this last portion of the order, which directed the trial to start before the Tribunal had decided the preliminary issues and particularly issue 1, which if it were decided in his favour, would obviate any need for enquiry and trial and this is the subject-matter of W.P. No. 611 of 1957.

We shall first take up for consideration W.P. No. 668 of 1957, which seeks the issue of a writ of *certiorari* to quash the order of the Tribunal in I.A. No. 3 of 1957 in so far as it permitted the respondent to add new grounds of disqualification for calling in question the election of the petitioner—the returned candidate. In the petition as originally filed, the allegations as regards the disqualification of the petitioner to stand for election were set out in paragraph 5 which ran ;

"5. The petitioner submits that on the date of the election of the respondent (the returned candidate) he was disqualified to be chosen to fill a seat in the Madras Legislative Assembly under section 7 (*d*) of the Representation of the Peope Act, 1951 (hereinafter called the Act) for the following reasons :

The respondent was on the date of his election the largest shareholder in a Private Limited Company called the Chettinad Company, Ltd., holding 5,585 shares of Rs. 1,000 each and 14,767 shares of Rs. 100 each. At the same time the said Chettinad Company, Ltd., was the largest shareholder in another private limited company called Madura South India Corporation, Ltd., Madura holding 7,926 shares of Rs. 100 each. The said Madura South India Corporation, Ltd., in or about the year, 1955, entered into a contract with the Government of Madras through the P.W. Department for the execution of the work of construction of buildings for the Government Medical College which has been built in the grounds of the Collectorate of Madurai district at Madurai. The petitioner submits that the said contract was subsisting on the date of election of the respondent and that the respondent by reason of the facts stated above has a share or interest in the said contract between the Madura South India Corporation Ltd., and the Government of Madras for the execution of the said works, namely the buildings for the Madras Government Medical College at Madurai, undertaken by the Madras Government and, therefore, the respondent was disqualified from being chosen to fill a seat in the Madras Legislative Assembly and the acceptance of the respondent's nomination was improper and the respondent's election is therefore liable to be declared void."

In the affidavit in support of I.A. No. 3 of 1957 the respondent stated in paragraph 3 :

"The respondent (the returned candidate) is the largest shareholder in the Chettinad Company, Ltd. This company and the respondent have interest or shares in a number of other subsidiary concerns like the South India Corporation, Ltd., Madurai, etc. ; such subsidiary companies have been formed only to suit the exigencies of each business while the respondent, directly and through the Chettinad Company, Ltd., has the controlling interest in such subsidiary concerns and all such concerns have subsisting contracts for the supply of goods, execution of works, etc., with the Government of Madras. I have mentioned only one such concern in paragraph 4 of the petition by way of example. Reference to other such concerns having contract with the Government has been omitted by oversight. The petition has therefore to be amended suitably as indicated in the application."

The other subsidiary concerns referred to in this affidavit were thus set out in paragraph 2 of I.A. No. 3 of 1957 :

"2. In paragraph 5 after the words 'for the following reasons' add 'The respondent has a share or interest in a number of companies known as (*a*) The Chettinad Company, Limited, (*b*) The Chettinad Corporation, Ltd., (*c*) The South India Corporation (Madras), Ltd., (*d*) The South India Corporation (Coimbatore), Ltd., (*e*) The South India Corporation (Cochin), Ltd., (*f*) The Trichy-Tanjore Electric Stores, Ltd., (*g*) The Madura South India Corporation, Ltd., and these companies have subsisting contracts with the Government of Madras for the supply of goods, execution of works, etc., 'for example'...."

By the order of the Tribunal, dated 4th August, 1957, these new items have become part of the allegations in the petition. It would be seen that, whereas in the election petition the petitioner was stated to be disqualified by reason of the petitioner being interested in one specified contract, by the amendment, this was enlarged and the disqualification was said to arise from the petitioner's share or interest in five other companies which had subsisting contracts with the State of Madras. I.A. No. 3 of 1957 was filed on 24th July, 1957, which was far beyond the 45 days from the date of the election, specified as the period of limitation for the presentation of an election petition under section 81 of the Act. The Tribunal allowed the application for amendment holding that it fell within Order 6, rule 17, of the Code of Civil Procedure which was applicable to the proceedings before it under section 90 (1) of the Act, which enacted :

"90 (1)—Subject to the provisions of this Act and of any rules made thereunder, every election petition shall be tried by the Tribunal, as nearly as may be, in accordance with the procedure applicable under the Code of Civil Procedure, 1908, to the trial of suits."

It also held that the decision of the Supreme Court in *Harish Chandra Bajpai* v. *Triloki Singh*[1], favoured such a construction as regards the power and jurisidction of the Tribunal.

Mr. Nambiar, learned counsel, for the petitioner, urged before us that the decision of the Supreme Court referred to by the Tribunal, far from supporting the respondent, was a direct authority for the position, that the Tribunal did not possess power or jurisdiction to order the amendment that it did, when it allowed I.A. No. 3 of 1957 in regard to this matter. It is therefore necessary to analyse in some detail this deci-

1. (1957) S.C.J. 297.

sion, to examine this submission. This decision was rendered on the terms of the Representation of the People Act, 1951, before it was amended in 1956. We shall therefore have to advert to the provisions of the Act before and after the amendment, in order to appreciate the points made by counsel for the petitioner.

Before Amendment.	*After Amendment.*
Section 81 (1).—An election petition calling in question any election may be presented on one or more of the grounds specified in sub-sections (1) and (2) of section 100 and section 101 to the Election Commission by any candidate at such election or any elector in such form and within such time but not earlier than the date of publication of the name or names of the returned candidate or candidates at such election under section 67, as may be prescribed.	*Section* 81 (1).—An election petition calling in question any election may be presented on one or more of the grounds specified in sub-section (1) of section 100 and section 101 to the Election Commission by any candidate at such election or any elector within fortyfive days from, but not earlier than, the date of election of the returned candidate, or if there are more than one returned candidate at the election and the dates of their election are different, the later of these two dates.
Section 83 (1).—An election petition shall contain a concise statement of the material facts on which the petitioner relies and shall be signed by the petitioner and verified in the manner laid down in the Code of Civil Procedure, 1908 (Act V of 1908) for the verification of pleadings. (2) The petition shall be accompanied by a list signed and verified in like manner setting forth full particulars of any corrupt or illegal practice which the petitioner alleges, including as full a statement as possible as to names of the parties alleged to have committed such corrupt or illegal practice and the date and place of the commission of each such practice. (3) The Tribunal may, upon such terms as to costs and otherwise as it may direct at any time, allow the particulars included in the said list to be amended or order such further and better particulars in regard to any matter referred to therein to be furnished as may in its opinion be necessary for the purpose of ensuring a fair and effectual trial of the petition.	*Section* 83 (1).—An election petition— (*a*) shall contain a concise statement of the material facts on which the petitioner relies; (*b*) shall set forth full particulars of any corrupt practice that the petitioner alleges, including as full a statement as possible of the names of the parties alleged to have committed such corrupt practice and the date and place of the commission of each such practice; and (*c*) shall be signed by the petitioner and verified in the manner laid down in the Code of Civil Procedure, 1908, for the verification of pleadings.
Section 85.—If the provisions of section 81, section 83 or section 117 are not complied with, the Election Commission shall dismiss the petition.	*Section* 85.—If the provisions of section 81 or section 82 or section 117 have not been complied with, the Election Commission shall dismiss the petition.
Section 90 (2).—Subject to the provisions of this Act and of any rules made thereunder, every election petition shall be tried by the Tribunal, as nearly as may be, in accordance with the procedure applicable under the Code of Civil Procedure, 1908, to the trial of suits.	*Section* 90 (1).—Subject to the provisions of this Act, and of any rules made thereunder, every election petition shall be tried by the Tribunal, as nearly as may be, in accordance with the procedure applicable under the Code of Civil Procedure, 1908, to the trial of suits.
Section 90 (4).—Notwithstanding anything contained in section 85, the Tribunal may dismiss an election petition which does not comply with the provisions of section 81, section 83 or section 117.	*Section* 90 (3).—The Tribunal shall dismiss an election petition which does not comply with the provisions of section 81, section 82 or section 117 notwithstanding that it has not been dismissed by the Election Commission under section 85.
	Section 90 (5).—The Tribunal may, upon such terms as to costs and otherwise as it may deem fit, allow the particulars of any corrupt practice alleged in the petition to be amended or amplified in such manner as may in its opinion be necessary for ensuring a fair and effective trial of the petition, but shall not allow any amendment of the petition which will have the effect of introducing particulars of a corrupt practice not previously alleged in the petition.

Before Amendment.

Section 92.—The Tribunal shall have the powers, which are vested in a Court under the Code of Civil Procedure, 1908 (Act V of 1908), when trying a suit in respect of the following matters :

(*a*) discovery and inspection ;

(*b*) enforcing the attendance of witnesses, and requiring the deposit of their expenses ;

(*c*) compelling the production of documents ;

(*d*) examining witnesses on oath ;

(*e*) granting adjournments ;

(*f*) reception of evidence taken on affidavit ; and

(*g*) issuing commissions for the examination of witnesses

and may summon and examine *suo motu* any person whose evidence appears to it to be material ; and shall be deemed to be a civil Court within the meaning of sections 480 and 482 of Code of Criminal Procedure, 1898 (Act V of 1898).

After Amendment.

Section 92.—The Tribunal shall have the powers, which are vested in a Court under the Code of Civil Procedure, 1908 (Act V of 1908), when trying a suit in respect of the following matters :

(*a*) discovery and inspection ;

(*b*) enforcing the attendance of witnesses and requiring the deposit of their expenses ;

(*c*) compelling the production of documents ;

(*d*) examining witnesses on oath ;

(*e*) granting adjournments ;

(*f*) reception of evidence taken on affidavit ; and

(*g*) issuing commissions for the examination of witnesses

and may summon and examine *suo motu* any person whose evidence appears to it to be material ; and shall be deemed to be a civil Court within the meaning of sections 480 and 482 of the Code of Criminal Procedure, 1898 (Act V of 1898).

The question before the Supreme Court in *Harish Chandra Bajpai's case*[1], was as regards the legality of an order of the Tribunal allowing an amendment to certain charges of corrupt practice made against the returned candidates. In his original election petition the respondent before the Supreme Court (who was the election petitioner) had stated that the returned candidate (the case was concerned with an election to a double-member constituency) "*could* in furtherance of their election *enlist* the support of certain Government servants." He intended this allegation to be treated as a charge of corrupt practice falling under section 123 (8) which defined the following as corrupt practice :

" (8) The obtaining or procuring or abetting or attempting to obtain or procure by a candidate or his agent or, by other person with the connivance of a candidate or his agent, any assistance for the furtherance of the prospects of the candidate's election from any person serving under the Government of India or the Government of any State other than the giving of vote by such person."

Illustrations were given in the petition of the manner in which this was done and these allegations wound up with a statement. "The respondents 1 and 2 by this device succeeded in creating an impression on the voters that they had the support of the district officials." The election petition contained no list of particulars attached to the petition as required by section 83 (2) of the Act. The regularity of these pleadings was attacked by the returned candidates, on the ground that they were vague and lacking in particulars and so liable to be struck off. In answer to this, the election-petitioner filed a replication, in which he stated for the first time that " the denial of the respondents 1 and 2 is absolutely wrong, inasmuch as many Government servants *worked for, issued appeals and became polling agents* for respondents 1 and 2." In other words, in the replication allegations were made that the Government servants actually worked for the returned candidates. This pleading was objected to by the returned candidates, and they requested for a preliminary hearing of certain issues which arose on their allegation that the petition was vague and must be struck off for want of particulars. Their application was disposed of by the Tribunal by deleting certain of the matters introduced by the replication, but holding that the allegations in the original petition were not vague, the election-petitioner, however, being required to name the Government servants. Subsequently the election-petitioner filed a further petition for amendment on the same lines as in the replication. This was opposed by the returned candidates on the ground that the amendment did not fall within section 83 (3), namely, "particulars or better particulars of the matter referred to" in the petition, but that they were particulars really of new charges sought

1. (1957) S.C.J. 297.

to be added long after the period of limitation for filing an election petition had lapsed. The Tribunal allowed the application for amendment on the ground that they were particulars in respect of the charges in substance already made, and that Order 6, rule 17, Civil Procedure Code, which was applicable to the proceedings before it, enabled it to make that order.

It was the correctness of this order for amendment that was the main subject of consideration before the Supreme Court. This was dealt with under two heads: (1) whether it fell within the power conferred upon the Tribunal under section 83 (3); (2) alternatively whether it could be supported under section 90 (2) of the Act read with Order 6, rule 17, of the Code of Civil Procedure. His Lordship, Venkatarama Ayyar, J., who delivered the judgment of the Court first dealt with the scope of section 83. He said:

"In our opinion, section 81 (1) and section 83, sub-sections (1) and (2), when correctly understood, support the contention of the respondent that the Tribunal has authority to allow an amendment even when that involves inclusion of new instances, provided they relate to a charge contained in the petition. Taking first section 81 (1), it enacts that a petition may be presented calling an election in question on one of the grounds specified in section 100, sub-sections (1) and (2) and section 101. These sections enumerate a number of grounds on which the election may be set aside, including the commission of the corrupt practices mentioned in section 123 that constitute the grounds mentioned in section 81 (1). Then we come to section 83 (1). It says that the petition should contain a concise statement of the material facts, and that would include facts relating to the holding of the election, the result thereof, the grounds on which it is sought to be set aside, the right of the petitioner to present the petition and the like. Then section 83 (2) enacts that when there is an allegation of corrupt or illegal practice particulars thereof should be given in a separate list. If the grounds on which an election is sought to be set aside are something other than the commission of corrupt or illegal practices, as for example, when it is stated that the nomination had been wrongly accepted or that the returned candidate was not entitled to stand for election, then section 83 (2) has no application, and the requirements of section 83 (1) are satisfied when the facts relating to those objections are stated. The facts to be stated under section 83 (1) are thus different from the particulars which have to be given under section 83 (2). When, therefore, an election is challenged on the ground that the candidate has committed the corrupt practices mentioned in section 123, instances constituting particulars thereof will properly fall within section 83 (2) and not section 83 (1). The result is that the power under section 83 (3) to allow further and better particulars will include a power to allow fresh instances of the charges, which form the grounds on which the election is questioned."

After referring to the decisions of English Courts on the interpretation of the corresponding sections of the Parliamentary Elections Act, 1868, his Lordship proceeded:

"These decisions establish that the requirements as to statement of grounds and facts is satisfied when the charge on which the election is sought to be set aside is set out in the petition, that the failure to give therein particulars of corrupt and illegal practices on which it is founded is not fatal to its maintainability, and that it is sufficient if the particulars are ordered to be furnished within a reasonable time before the commencement of the trial. On the same reasoning, the conclusion should follow that section 81 (1) and section 83 (1) are complied with, when the grounds, on which election is sought to be set aside, are stated in the petition, those grounds being, as already stated, the matters mentioned in section 100, sub-sections (1) and (2), section 101 and section 123, which is attracted by section 100 (2) (*b*) and that the particulars in respect of those grounds, when they are charges of corrupt or illegal practices, fall within section 83 (2).

Section 83 (3) provides, it should also be noted, for the list of particulars being amended or enlarged. It is not, however, to be inferred from this that when the particulars are mentioned in the body of the petition, they could not be amended. The reference to the list in section 83 (3) must be taken along with the provision in section 83 (2) that particulars are to be set out in a list to be "attached to the petition". The substance of the matter, therefore, is that under section 83 (3) particulars can be amended and supplemented and the reason of it requires that the power could be exercised even when the particulars are contained in the body of the petition. And even when there is no list filed, as in the present case, it would be competent to the Tribunal to allow an amendment giving for the first time instances of corrupt practice, provided such corrupt practice has been made a ground of attack in the petition........In this view, the order of amendment in question is not open to attack on the ground that it has permitted new instances to be raised. What has to be seen is whether those instances are, in fact, particulars in respect of a ground put forward in the petition or whether they are, in substance, new grounds of attack".

His Lordship then held that in the case before the Court what had been sought to be introduced by way of amendment were not really fresh instances of the same charge of corrupt practice, but altogether new charges and proceeded to consider whether this could be justified under Order 6, rule 17, which has been made applicable to the Tribunal under the provisions of section 90 (2) of the Act. The learned Judge pointed out that the provisions of the Civil Procedure Code were made applicable

to proceedings before the Election Tribunals, only subject to the provisions of this Act, and one of the provisions of the Act was that which limited the time within which an election petition could be filed. He therefore held that the respondent before the Supreme Court could not sustain the legality of the order for amendment on the basis of section 90 (2) of the Act. His Lordship explained the position thus :

"It is next contended for the appellants that......the exercise of the power under that rule (Order 6, rule 17, Civil Procedure Code) must, nevertheless, be subject to the conditions prescribed by section 81 for presentation of an election petition, that one of those conditions was that it should be presented within the time allowed therefor, and that accordingly no amendment should be allowed which would have the effect of defeating that provision. The decisions in *Maude* v. *Lowley*[1] and *Birbeck* v. *Bullard*[2], are relied on in support of this contention. In *Maude* v. *Lowley*[1], the facts were that an election petition was filed alleging that the successful candidate had employed as paid canvassers residents of the ward, and that the election was, in consequence void. Then an application was filed for amending the petition by alleging that residents of other wards were also similarly employed, and that was ordered by Baron Pollock. The correctness of this order was questioned on the ground that on the date of the application for amendment a fresh petition on those allegations would be barred, and that therefore the Court had no jurisdiction to pass the order which it did. In upholding this contention, Lord Coleridge, C.J., observed that section 21 (5) gave power to the Court to amend the petition, that that power was subject to the provisions of the Act, that one of those provisions was section 13 (2) which prescribed the period within which an election petition could be filed, that the power of amendment could be exercised only subject to this provision, and that accordingly an amendment which raised a new charge should be rejected if a fresh petition on that charge would be barred on that date. He also observed that the matter was not one of discretion but of jurisdiction. This was followed in *Clark* v. *Walland*[3]. In *Birbeck* v. *Bullard*[2], the application was to amend the petition by adding a new charge, and it was held that that could not be done after the expiry of the period of limitation fixed in the Act for filing an election petition, and the decision was put on the ground that the power to grant amendment was 'subject to the provisions of the Act'".

On these authorities, it is contended for the appellants that even if the Tribunal is held to possess a power to order amendment generally under Order 6, rule 17, an order under that rule cannot be made when a new ground or charge is raised, if the application is made beyond the period of limitation prescribed for filing election petitions. The Tribunal sought to get over this difficulty by relying on the principle well-established with reference to amendments under Order 6, rule 17, that the fact that a suit on the claim sought to be raised would be barred on the date of the application would be a material element in deciding whether it should be allowed or not, but would not affect the jurisdiction of the Court to grant it in exceptional circumstances as laid down in *Charan Das* v. *Amir Khan*[4]. But this is to ignore the restriction imposed by section 90 (2), that the procedure of the Court under the Code of Civil Procedure in which Order 6, rule 17, is comprised is to apply subject to the provisions of the Act and the rules, and, there being no power conferred on the Tribunal to extend the period of limitation prescribed, an order of amendment permitting a new ground to be raised beyond the time limited by section 81 and rule 119 must contravene those provisions and is, in consequence, beyond the ambit of authority conferred by section 90 (2). We are accordingly of opinion that the contention of the appellants on this point is well founded and must be accepted as correct.

We have already set out the relevant provisions of the Act as amended for comparison with those which the Supreme Court had to construe in *Harish Chandra Bajpai's Case*[5]. It will be seen that substantially there is little material change effected. No doubt the last words of section 90 (5) might appear to embody in statutory form, the construction which section 83 (3) of the original amendment received in *Bajpai's Case*[5]. For the purpose of the petition before us, however, this is not material. The principles that are to be deduced from the decision of the Supreme Court are : (1) section 83 (2) and (3) of the original enactment lay down a special rule applicable to charges of corrupt practice and the amendment of particulars regarding them. Where a charge of corrupt practice is made fresh instances of such corrupt practice might by way of amendment, be added even after the period of limitation for the filing of a petition had elapsed, by reason of the use of the expression "at any time" in section 83 (3).

1. (1874) L.R. 9 C.P. 165, 172.
2. (1885-86) 2 T.L.R. 273.
3. (1883) 52 L.J.Q.B. 321.
4. (1920) 39 M.L.J. 195.
5. (1957) S.C.J. 297.

Where, however, a new charge of corrupt practice, and not merely a fresh instance of an already formulated charge, is sought to be added, this would not be covered by section 83 (3) and the jurisdiction to allow it would be dependent on the proper construction of section 90 (2) of the Act. (2) In cases not covered by section 83 (2) and 83 (3), that is, in relation to grounds for the avoidance of an election resting on reasons other than charges of corrupt practice, there being no special rule governing the permissible amendments, the matter is governed by the provisions of section 90 (2) of the Act, which render the provisions of the Civil Procedure Code applicable to the trial of suits to the trial of the election petitions. Among the provisions of the Civil Procedure Code thus rendered applicable would undoubtedly be that contained in Order 6, rule 17. (3) If section 90 (2) were absolute and unconditional, the power of the Tribunal would have been plenary and subject to no limitation except the requirement that the discretion to order an amendment should be properly exercised with reference to the facts and circumstances of each particular case. Even if the Tribunals had such a power the usual rule by which Civil Courts refuse an amendment which introduces a fresh cause of action after the period of limitation within which it could be agitated had expired, would be applicable to such Tribunals. (4) Section 90 (2) however is not absolute but is subject to the provisions of the Act. Among the provisions of the Act which are very material and relevant to the context are those in section 81, prescribing the period of limitation within which an election petition should be filed. The power of the Tribunal to order an amendment by invoking the provisions of Order 6, rule 17, is subject to this limitation prescribed by section 81. Where, therefore, by an amendment a party applying for it, seeks to allege a new fact and not merely to explain or clarify a material fact already stated, as a ground for setting aside the election, the same cannot be allowed if the application is made after the period prescribed by section 81 for filing a petition had elapsed.

The decision of the Supreme Court was no doubt based on the language of the Act as it stood before the amendment. But as we have already pointed out, the amendments effected by Act XXVII of 1956 have not effected any material change in the provisions relevant to the present context. Indeed learned counsel for the respondent did not seek to make any point based on there having been any such change.

We shall now proceed to consider the nature of the amendments allowed in the present case in the light of the above discussion. In the petition as originally filed, the respondent had alleged that the petitioner was disqualified for being chosen to fill a seat by reason of his interest in a contract falling within the classes specified in section 7 (*d*) of the Act. We have already mentioned that the election petition had specified the contract and stated it as a ground for disqualification as also the manner in which the petitioner's interest fell within the terms of section 7 (*d*). By the amendment a set of entirely new contracts, unrelated to the one specified in the original petition, was put forward as further grounds for disqualification. If the allegations in respect of any one of these contracts were established and the interest alleged came within the terms of section 7 (*d*), the petitioner would have been disqualified for standing for election and his election would have to be delcared void. The application for amendment having been filed long after the period of limitation prescribed by section 81 of the Act was over, the submission of learned counsel for the petitioner, that the Tribunal had no jurisdiction to permit the amendment, appears to us to be well-founded. The decision of the Supreme Court no doubt related to the making a fresh charge of corrupt practice, but the reasoning on which this was rested, is in our opinion applicable to an amendment, seeking to introduce a new item of disqualification.

Mr. Kumaramangalam, learned counsel for the respondent, urged that the Act by section 83 (1) (*a*) merely required the petition to contain a concise statement of the material facts on which the petitioner relied. He urged that if in the present case, the respondent had stated that the petitioner was disqualified from standing for election by reason of his interest in a contract or contracts falling within section 7 (*d*) of the Act, without specifying or identifying the contract or contracts, the election petition would have still conformed to the requirements of the Act, and that if, by

reason of this vagueness, the petitioner had thereafter required particulars to be furnished of the contracts, the respondent could have furnished them within the time limited by the Tribunal. If he was right so far, learned counsel urged that the respondent ought not to be prejudiced merely because he furnished one instance of such a contract. We feel unable to uphold these contentions. In the first place, the election petition did not contain any general statement which could cover contracts other than the one specified in it. We doubt whether an allegation in general terms, such as the one suggested by learned counsel for the respondent, would have satisfied the requirements of section 83 (1) which required that an election petition should state " the material facts" on which the petitioner relied for the relief that he sought. The following observations of Mr. Baron Pollock in the *Lancaster Division Election case*[1] appear to us to be apt and in point. The Court was there dealing with fresh instances of corrupt practice sought to be brought in, by way of particulars furnished of the charges already made. The learned Baron said :

> " The present petition had been drawn up in a general form, and no one had a right to gain any indirect advantage by reason of its being so drawn...It would have been dealing extremely harshly if time and advantage were given to the petitioners by reason of the general form in which the petition had been drawn. That was not the intention of the Act, and they must see that they did nothing contrary to it. The intention of the Act was, as shown by section 40, to limit the time within which charges could be made. The additional particulars must be struck out."

In our judgment, therefore, if the petition had been drawn as indicated by the respondent's counsel, it is doubtful—we say so because we do not wish finally to decide a matter which in this precise form is not before us—whether the election-petitioner could be permitted to furnish particulars after the period of limitation was over. But the present petition was not in that form. It specified an individual contract not merely as an instance of the contracts in which the returned candidate was intrested but as the contract which acted as a disqualification. In these circumstances we entertain no doubt that by the amendment the respondent was seeking to add fresh grounds of disqualification, since each of the new contracts was separate and constituted a distinct ground of disqualification. This the Tribunal had no jurisdiction to allow after the period of limitation prescribed by section 81 had elapsed

Mr. Kumaramanagalam next contended that the facts in *Maude* v. *Lowley*[2], which had been approved and followed by the Supreme Court, could not support the disallowance of the amendment in the case before us. The argument on this part of the case was briefly as follows : The Supreme Court had in *Bajpai's case*[3], laid down that fresh instances of a corrupt practice already alleged in the petition could be allowed by way of amendment. *Maude* v. *Lowley*[2] was not such a case but one where a fresh charge of corrupt practice was sought to be brought in by way of amendment. The only type of amendments which election Tribunals were precluded from granting were those in which a new charge of corrupt practice was sought to be introduced. Where, however, a ground or a charge had already been made, other instances of the same charge might be introduced by way of amendment. We are wholly unable to accept this argument which runs entirely counter to the decision of the Supreme Court. We see no distinction between a fresh charge of corrupt practice which according to the learned Judges in *Maude* v. *Lowley*[2], rendered the election petition a new one and a ground *for disqualification*. We are not here concerned with fresh instances of the same charge of corrupt practice which the Supreme Court held the Tribunals had power to permit by way of amendment since this was rested on the specific provision in section 83 (3). Outside this special provision, the power of the Tribunals is governed by section 90 (1) where it is limited in the manner we have already indicated. In our judgment the order of the Tribunal allowing the amendment prayed for in paragraph 2 of I.A. No. 3 of 1957 was beyond its jurisdiction.

Learned counsel for the respondent urged that notwithstanding our above conclusion we should not interfere at this stage and that these matters should be

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1. 5. O'Malley and Hardcastle Election Petitions, 39.
2. (1874) L.R. 9 C.P. 165, 172.
3. (1957) S.C.J. 297.

considered only after the Tribunal finally disposed of the petition and in an appeal filed from it under section 116-A of the Act. For reasons which we shall set out later, we are rejecting this objection. The order of the Tribunal being without jurisdiction, we hold that we should interfere even at this stage and set it aside. W.P. No. 668 of 1957 is allowed and the order of the Tribunal allowing the amendment set out in paragraph 2 of I.A. No. 3 of 1957 will be set aside.

We shall now proceed to consider W.P. No. 611 of 1957. This, it will be seen, is for the issue of a writ of prohibition directing the Tribunal not to proceed further with the petition on the ground that the petition was defective in not complying with the requirements of section 81. We shall briefly recapitulate the history of the controversy involved in this writ petition. In I.A. No. 1 of 1957 the petitioner had prayed for the deletion of several paragraphs of the petition whose details are to be found in issues 2 to 7 which we have extracted earlier. The ground upon which this relief was sought was that even if the allegations as stated in the several paragraphs were to be established they could not constitute acts of corrupt practice on the basis of which the election could be avoided. I.A. No. 1 of 1957 was heard by the Tribunal and by its order dated 14th July, 1957, the Tribunal recorded :

> "The arguments on either side were able and intricate and questions affording great difficulty in solution were raised. The points raised are really issues arising in the case to be dealt with and disposed of at the conclusion of the trial." Order 6, rule 16 of the Code of Civil Procedure reads: "The Court may at any stage of the proceedings order to be struck out or amended any matter in any pleading which may be unnecessary or scandalous or which may tend to prejudice, embarrass or delay the fair trial of the suits." This rule is intended for use in cases where the matters are practically clear and the question as to whether particular portions of the pleadings to be struck off are of the character mentioned therein offer no great difficulty and do not form issues in the case itself. In this case as already stated, the questions raised are far from clear and form issues to be determined between the parties... At this stage, I consider it undesirable to pronounce orders upon the points raised in the petition and I therefore refrain from doing so and keep the petition pending to be dealt with and disposed of should as aforesaid an occasion arise in the course of the trial or at the end of the trial ".

This practically amounted to an adjournment of the petition for disposal on a later occasion. By a direction contained in the same order the Tribunal directed the petitioner to file his written statement. This statement was filed on 24th July, 1957. In paragraph 2 of the statement the petitioner urged that the election petition presented was not in accordance with the Act and that it violated section 81 of the Act:

> " inasmuch as it is not based on the grounds specified in sub-section (1) of section 100 in regard to several charges ".

This was expanded in paragraph 3 which ran :

> "An election petition can be filed only on one or more of the grounds specified in sub-section (1) of section 100 and section 101. If the charges made do not relate to the grounds specified in the above provisions, this Honourable Tribunal could have no jurisdiction to enquire into the same. The election petition contains a large number of charges which are not based on the grounds set out in the provisions of the Act mentioned above ".

Paragraphs 4 to 7 set out the several paragraphs of the election petition which, according to the petitioner, did not constitute allegations of corrupt practice as defined in the Act. On these grounds the petitioner raised an objection to the jurisdiction of the Tribunal to enquire into the petition and prayed for an order dismissing the petition under section 90 (3) for non-conformity with section 81. On the same date on which the written statement was filed the respondent filed an application I.A. No. 4 of 1957 to amend the petition by adding allegations to each of the several paragraphs to which exception was taken. These amendments, however, were disallowed by the Tribunal on 4th August, 1957 and the propriety of this disallowance is not in controversy before us. On the same day issues were settled and we have set out the issues 1 to 8 as then framed. The Tribunal, however, orally intimated to the parties that issues 1 to 7 would not be dealt with as preliminary issues but would be taken up only during the course of the trial. It is this procedure adopted by the Tribunal that is complained of by Mr. Nambiar, learned counsel for petitioner, as beyond the jurisdiction of the Tribunal.

We shall now proceed to set out the submission of Mr. Nambiar on this part of the case. Learned counsel said that the Tribunal was the creation of a statute which had vested it with a limited jurisdiction. When the Tribunal outstepped those limits, the party aggrieved was entitled as of right to invoke the powers of this Court under Article 226 to issue a writ of prohibition to ensure that the Tribunal did not proceed to enquire into the petition which under the statute was not a petition which it could lawfully keep on its file. Section 80 of the Act enacted that

"no election shall be called in question except by an election petition presented in accordance with the provisions of the Act",

and it was only an election petition that conformed to the statutory requirements that could be properly enquired into by a Tribunal. Section 81 defined the grounds on which an election petition could be presented and unless the grounds stated in the petition were those set out in sections 100 and 101, it would not be a petition falling within section 81. Section 100 which was the one relevant to the present case enacted the grounds on which an election might be declared void and among them were acts of corrupt practice on the part of the candidate or his agents. The allegations in the present election petition contained in the paragraphs referred to in issues 2 to 7 were not corrupt practices; such as, even if established, would lead to the setting aside of the election of the returned candidate. The inclusion of these allegations rendered the petition one not in accordance with the requirements of section 81 and hence the Tribunal was by section 90 (3) of the Act bound to dismiss it *in limine*. The Tribunal, however, had, instead of doing so, expressed its intention to proceed to enquire into the merits of the petition which it had no jurisdiction to do. Learned counsel urged the above as the grounds for the allowance of W.P. No. 611 of 1957.

It would be seen that the basic postulate of this argument rests on some of the allegations in the petition not answering the requirements of a "corrupt practice" which if proved would be capable of avoiding an election. Mr. Nambiar therefore urged that we should examine the several allegations in the petition in regard to the corrupt practices charged against the returned candidate, with a view to find out whether they fell within the terms of the statute. We however intimated to him at an early stage of the argument, our unwillingness to embark on this enquiry. It is not in dispute that the Tribunal was vested with jurisdiction to enquire into the matter which learned counsel invited us to consider. The question is one which arises on the construction of the pleadings in the case and the Tribunal is the primary authority vested with jurisdiction in that behalf. The petition had been received by the Election Commission and had been referred to the Tribunal under section 86. The Tribunal had therefore to enquire into the petition. Of course the Tribunal is by section 90 (3) enjoined to dismiss a petition which did not comply with the requirements of sections 81, 82 and 117, and it was this power that had been invoked by the petitioner. But before this power could be exercised the Tribunal had to be satisfied that the requirements of the section had not been complied with. It had therefore not merely jurisdiction to enquire into this matter but indeed it was its duty to satisfy itself about it before it passed any such order. The Tribunal had in the exercise of its undoubted jurisdiction framed issues on the pleadings and had raised the points mentioned by Mr. Nambiar for consideration. In these circumstances, we do not find any justification for this Court assuming, as it were, the functions of the Tribunal and examining matters which Parliament has assigned primarily if not exclusively to the Tribunal.

The next submission of Mr. Nambiar was that the Tribunal acted improperly and irregularly in not deciding issues 1 to 7 as preliminary issues before proceeding with the trial of the petition. In this connection learned counsel stated that the respondent had filed a list of witnesses numbering over 400 to prove the allegations in the petition, and that the course proposed to be followed by the Tribunal, *viz.*, of deciding issues 1 to 7 during the course of or after the completion of the trial, would involve the petitioner in such an amount of expenses and delay most of which would be unnecessary and a waste, if

issues 1 to 7 were decided in favour of the petitioner. We see considerable force in this argument. When witnesses are being examined, it would be nearly impossible to restrict the evidence to the allegations other than those in the paragraphs of the petition covered by issues 2 to 7. Even if this were possible and the witnesses confined themselves to the other matters, they would have to be recalled and examined afresh in the event of issues 2 to 7 being decided in favour of the respondent. From their very nature, issues 1 to 7 have to be decided first before the start of the trial and that is precisely why they have all been clubbed together in issue 8.' The reason adduced by the Tribunal for not deciding them before the trial of the other issues does not appeal to us to justify that course. The Tribunal has no doubt not passed any formal order on issue 8, but the parties before us are agreed that the Tribunal has in effect decided issue 8 against the petitioner for the reasons stated in its order dated 24th July, 1957, on I.A. No. 1 of 1957. The ground upon which the Tribunal practically adjourned consideration on the merits of I.A. No. 1 of 1957 was that it raised diffiult questions for decision. It is unnecessary to consider whether that was not a relevant or proper matter to be considered in an application to strike off the pleadings of an adversary under Order 6, rule 16. But when, after the written statement was filed and the subject-matter of I.A. No. 1 of 1957 became preliminary issues, different considerations governed the matter. This applied *a fortiori* to issue 1 which raised the question of the jurisdiction of the Tribunal to continue the enquiry. Issues 2 to 7 were in a way linked up with issue 1 though even if issue 1 were decided in favour of the respondent, the others had to be considered. These issues involved the consideration of no evidence, oral or documentary, and had to be determined on a construction of the petition read in the light of the provisions of the Act. The postponement of their consideration led to no advantage, because considered at whatever stage in the course of the enquiry, the material on which their decision could rest was identical. On the other hand such postponement was calculated to embarrass the trial, particularly for the petitioner, and we will add, for the Tribunal also—and be a source of delay for its completion. The fact that the determination of the matters covered by these issues involved difficulty can of course not be a ground for putting off their consideration—and this is the only reason assigned by the Tribunal for this postponement. With due respect to the learned Judge of the Tribunal we feel unable to endorse the propriety or justification of the course it has adopted.

The error committed by the Tribunal in thus postponing the consideration of these issues might in one aspect be said to touch its jurisdiction. Take for instance issue 1. If this were decided in favour of the returned candidate, the duty of the Tribunal would be to dismiss the petition. In other words it would have no jurisdiction to enquire into the allegations in the petition. We therefore consider it proper that we should issue a direction to the Tribunal to decide issues 1 to 7 in the first instance before proceeding further with the trial in the sense of receiving oral or documentary evidence on the several issues framed.

We have now to refer to a contention urged before us by Mr. Mohan Kumaramangalam in the nature of a preliminary objection to our issuing any direction to the Tribunal as to the order in which the issues have to be decided, a contention whose range extended to our interfering with the order in I.A. No. 3 of 1957 dealt with earlier. Broadly stated the argument was this. The Tribunal was vested with jurisdiction to enquire into the petition and it had practically all the powers conferred on a civil Court by the Civil Procedure Code in conducting that enquiry. Assuming that it committed any error in the exercise of the powers thus conferred, there was no transgression of the limits of the jurisdiction to call for the issue of a writ of prohibition but that could only be a case of an erroneous decision not correctable by recourse to the powers of this Court under Article 226. Even if this extreme submission was not sustainable, learned counsel added that still this Court would not in the exercise of its discretion issue any direction because of the express provision for appeals from the final orders of the Tribunal under section 116-A of the Act. This provision for appeal from final orders should be held to debar the

invoking of the powers of this Court to set aside interlocutory orders and also orders and directions of the Tribunal as to the manner in which it would in its discretion conduct the enquiry. Having given our best consideration to these arguments we have decided to repel them.

In the first place the power and jurisdiction of the Tribunal which is a creation of the Act are not plenary but limited, and it has to function within the limits set to it. Take the case first of the amendments allowed by the Tribunal when it ordered I.A. No. 3 of 1957. The jurisdiction of the Tribunal to allow amendments which it possessed by reason of the application of the provisions of the Civil Procedure Code to the trial of election petitions was, however, by section 90 (1), "subject to the provisions of the Act" which included section 81. We were satisfied that this order for amendment passed by the Tribunal was beyond its jurisdiction and was vitiated by apparent error in misunderstanding the decision of the Supreme Court in *Bajpai's case*[1]. Turning to the order impugned in W.P. No. 668 of 1957 it was no doubt an interlocutory one, but Article 226 is couched in the widest terms and is not confined to final orders. There being no statutory or constitutional bar to the exercise of our powers the question that we had to consider was whether in the exercise of our discretion we should interfere at this stage. The existence of a provision for an appeal was certainly a material factor to be taken note of but that is not determinative. We took into account the fact that the policy of the Act was to have an expeditious disposal of election petitions, and we considered that this would be frustrated if we did not set aside, what we were convinced was an erroneous order which if it had continued to be in force, would have enlarged the enquiry by evidence, which at a later stage would have to be discarded. It is the same process of reasoning that has led us to the conclusion that we should issue the direction we have indicated above in W.P. No. 611 of 1957 in regard to the manner in which the issues should be decided.

The result is that in W.P. No. 611 of 1957 there will be a direction that the Tribunal do proceed with the determination of issues 1 to 7 before taking up the further trial of the election petition.

There will be no order as to costs in either petition.

P.R.N. *W.P. No.* 611 *allowed* : *Direction issued.*
W.P. No. 668 *allowed* : *Order set aside.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. P. RAJAGOPALAN, *Officiating Chief Justice* AND MR. JUSTICE RAJAGOPALA AYYANGAR.

G. Raja Nainar .. *Petitioner**

v.

N. T. Velusami Thevar and others .. *Respondents.*

Representation of the People Act (*XLIII of* 1951), *sections* 36 and 100 (1) (*c*)—*Election Petition to set aside election on the ground of improper rejection of nomination—Scope of enquiry by Tribunal—New objection to nomination—If could be taken.*

Under secion 36 of the Representation of the People Act, 1951, the Returning Officer is empowered to hold a summary enquiry and reject any nomination paper on certain specific grounds. Whether such rejection is improper can be decided by the Election Tribunal under section 100 (1) (*c*) of the Act in an election dispute. The word 'improper' in the context has to be construed as 'wrong', 'incorrect' or 'inaccurate'. The jurisdiction of the Tribunal under section 100 (1) (*c*) of the Act in an election dispute is co-extensive with that of the Returning Officer at the time of scrutiny, the only difference being that the enquiry before the Returning Officer is summary while the Tribunal has to decide the question after a trial.

Where the nomination of a candidate was rejected by the Returning Officer on a particular objection taken, in an election petition before the Tribunal filed by the person whose nomination is

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1. (1957) S.C.J. 297.

* W.P. Nos. 675 and 676 of 1957. 21st October, 1957.

stated to be improperly rejected, it is not open to the respondent to seek to establish that the nomination of such person could have been rejected on grounds other than those which the Returning Officer was called upon to decide. The correctness of the decision of the Returning Officer which the Tribunal has to consider is with reference to the objection that the Returning Officer had occasion to consider. It is the objection to the nomination formulated at the time of the scrutiny that limits the scope of the enquiry by the Tribunal in an Election Petition.

Tej Singh v. *Election Tribunal, Jaipur*, A.I.R. 1954 Raj. 204, differed.

Durga Shankar Mehta v. *Thakur Raghuraj Singh*, (1955) 1 S.C.R. 267 : (1954) S.C.J. 723 : (1954) 2 M.L.J. 385 (S.C.) ; *Vashist Narain Sharma* v. *Dev Chandra*, (1955) 1 S.C.R. 509 : (1954) S.C.J. 717 : (1954) 2 M.L.J. 379 (S.C.) ; *Hari Vishnu Kamath* v. *Syed Ahmed Ishaque*, (1955) 1 S.C.R. 1104 : (1955) S.C.J. 267 : (1955) 1 M.L.J. (S.C.) 157 (S.C.), referred to.

Petition under Article 226 of the Constitution of India praying that in the circumstances stated therein, and in the affidavit filed therewith the High Court will be pleased to issue a writ of *certiorari* calling for the records in Election Petition No. 109 of 1957 on the file of the Election Tribunal, Tirunelveli, and quash the order, dated 17th August, 1957 and made in I.A. No. 5 of 1957 in Election Petition No. 109 of 1957.

The Advocate-General (*V. K. Tiruvenkatachari*) and *T. Martin*, for Petitioner in both the petitions.

S. Mohan Kumaramangalam for *T. R. Mani* for the 1st Respondent in both the petitions.

The Court made the following

ORDER.—Six candidates including Velusami Thevar, the 1st respondent, Chellapandian, the second respondent, Ambalavapa Pillai, the third respondent, and Arunachalam, the fourth respondent, filed their nomination papers for election from the Alangulam Constituency for the Madras State Legislative Assembly. After the scrutiny of the nominations on 1st February, 1957, the Returning Officer rejected the nomination of Arunachalam, the fourth respondent, on an objection preferred by Chellapandian, the second respondent. Respondents 1, 2 and 3 were the candidates that eventually contested the election. The polling was held on 8th March, 1957. Velusami Thevar, the first respondent, was declared elected.

The objection preferred on 1st February, 1957, by the second respondent to the Returning Officer ran :

" Arunachala Nadar has filed nomination for Alangulam Constituency for Assembly (1). He is employed as Headmaster, National Training School, Tiruchendur, which is run with Government's grants-in-aid and as such he holds office of profit in a concern, where the State Government has financial interest. Therefore his nomination is objected to as invalid under section 7 (*d*) and (*e*) of Act XLIII of 1951 ".

The order of the Returning Officer, which itself pointed out that the decision had to be given *ex parte* Arunachalam, was :

" Sri S. Chellapandian raises objection to the nomination as a candidate for Alangulam Assembly Constituency on the ground that he is employed as Headmaster in the National Training School, Tiruchendur, which is run with Government grants-in-aid and as such he holds office of profit in a concern where the State Government has financial interest and as such his nomination is invalid under section 7 (*d*) and (*e*) of Act XLIII of 1951. Sri S. Arunachalam is not present at the time of scrutiny of nominations nor any authorised agent of his could take notice of the objection and file a reply. In view of the objection which has not been cleared by Sri S. Arunachalam by satisfying me that he is not holding an office of profit in a concern, in which the State Government has financial interst, the objection is upheld and Sri A. Arunachalam is disqualified under section 7 (*d*) and (*e*) of Act XLIII of 1951. Accordingly his nomination is rejected ".

In the written statement that he filed in answer to the election petition, the returned candidate Veluchami Thevar pleaded that Arunachalam was disqualified on several other grounds as well which it may not be necessary to enumerate at this stage. The petitioner preferred I.A. No. 5 of 1957 in effect to confine the enquiry before the Tribunal to the correctness or otherwise of the objections preferred by the second respondent before the Returning Officer. The Tribunal rejected the contentions of the petitioner and dismissed I.A. No. 5 of 1957 on 17th August, 1957. The petitioner applied under Article 226 of the Constitution for the issue

of a writ of *certiorari* to set aside the order of the Tribunal and also for the issue of a writ of prohibition.

The main question for determination in these proceedings before us is what is the scope of the enquiry before the Tribunal, when, in the exercise of the jurisdiction conferred on it by section 100 (1) (*c*) of the Representation of the People Act (XLIII of 1951) (hereinafter referred to as the Act), it has to decide whether or not the Returning Officer improperly rejected the nomination of a candidate.

With reference to the date fixed for the scrutiny of the nominations the relevant portion of section 36 (2) (*a*) of the Act runs :

" The Returning Officer shall then examine the nomination papers and shall decide all objections which may be made to any nomination, and may, either on such objection or on his own motion, after such summary inquiry, if any, as he thinks necessary, reject any nomination on any of the following grounds :—

(*a*) that the candidate either is not qualified or is disqualified for being chosen to fill the seat under any of the following provisions that may be applicable, namely :—

Articles 84, 102, 173 and 191 and Part II of this Act . . . ."

Section 36 (5) of the Act runs :

" The Returning Officer shall hold the scrutiny on the date appointed in this behalf under clause (*b*) of section 30 and shall not allow any adjournment of the proceedings except when such proceedings are interrupted or obstructed by riot or open violence or by causes beyond his control :

Provided that in case an objection is made, the candidate concerned may be allowed time to rebut it not later than the next day but one following the date fixed for scrutiny, and the Returning Officer shall record his decision on the date to which the proceedings have been adjourned."

Section 36 (6) directs :

The Returning Officer shall endorse on each nomination paper his decision accepting or rejecting the same and, if the nomination paper is rejected, shall record in writing a brief statement of his reasons for such rejection ".

Section 100 (1) (*c*) of the Act is to this effect :

" Subject to the provisions of sub-section (2), if the Tribunal is of opinion. . . . . .

(*c*) that any nomination has been improperly rejected . . . . the Tribunal shall declare the election of the returned candidate to be void."

The other provisions of the Act which we shall set out at this stage are sections 90 (1) and 98. The relevant portion of section 90 (1) runs :

" Subject to the provisions of this Act and of any rules made thereunder, every election petition shall be tried by the Tribunal, as nearly as may be in accordance with the procedure applicable under the Code of Civil Procedure (V of 1908) to the trial of suits ".

Section 98 provided :

" At the conclusion of the trial of an election petition the Tribunal shall make an order—

(*a*) dismissing the election petition ; or

(*b*) declaring the election of all or any of the returned candidates to be void . . . . "

It should be noted that the decision of the Returning Officer is based on a summary enquiry. The proviso to section 36 (5) limits the period to two days within which the candidate, the validity of whose nomination has been challenged, could rebut that challenge. Section 100 (1) (*c*) clothes the Tribunal with jurisdiction to decide whether the Returning Officer has improperly rejected a nomination. That decision has to be given after a trial of the issue whether the rejection of the nomination was improper. In the absence of any provision to the contrary in the Act or in the Rules framed thereunder, that trial has to be conducted in accordance with the provisions of the Civil Procedure Code. If, at such a trial, proof is furnished by the election petitioner and accepted by the Tribunal that a nomination has been improperly rejected, the Tribunal has to declare the election of the returned candidate void under section 98 (*a*) read with section 100 (1) (*c*) of the Act.

The scope of the allegation to be made by an election petitioner is limited by section 100 (1) (*c*)—that the rejection of the nomination by the Returning Officer

was improper. What is the scope of the trial before the Tribunal, to establish the truth of that allegation, is the question.

In construing the expression " propriety " in its context in section 64-A (Madras Amendment) of the Motor Vehicles Act, as it stood before that section was repealed, the Supreme Court pointed out in *Raman and Raman* v. *Government of Madras* :[1],

" The word propriety has nowhere been defined in the Act and is capable of a variety of meanings. In the Oxford English Dictionary, Vol. VIII, it has been stated to mean fitness, appropriateness, aptitude, suitability, appropriateness to the circumstances or conditions, conformity with requirements, rules or principle, rightness, correctness, justness, accuracy ".

That was a decision confirming the unreported judgment of this Court in Writ Appeal No. 65 of 1955. In Writ Appeal No. 65 of 1955 the learned Chief Justice stated :

" The word " propriety " has no precise connotation. In the context of judicial or quasi-judicial decisions, its meaning is not synonymous with correctness. Indeed, propriety is a term wholly inappropriate to the finding as regards legal rights of parties. . . . . . Where, however, legal rights are not involved and we are in the realm of discretion, terms like " propriety " and " proper " are apt ".

After referring to section 435, Criminal Procedure Code, where the expressions used were " correctness, legality or propriety ", the learned Chief Justice observed :

"Now the finding of an inferior criminal Court as to the guilt or innocence of an accused can be examined by the superior Court from the point of view of correctness or legality, but not from the point of view of propriety. But propriety has got a significance with reference to the sentences. A sentence may be correct and legal in the sense that it does not exceed the sentence prescribed by the Penal Code. Nevertheless the superior Court may find that the sentence is too harsh or severe and say that the proper sentence is something less severe than that what has been awarded by the inferior Court. The use of the words " correctness" and " propriety " in juxta-position to our mind indicates that the two words do not cover the same ground ".

What is the import of the expression " improper " in its context in section 100 (1) (*c*), which obviously is different from that, for example of section 64-A of the Motor Vehicles Act and section 435, Criminal Procedure Code ? Section 100 (1) (*c*) of the Act refers only to an improper rejection just as section 100 (1) (*d*) (i) refers to an improper acceptance of a nomination by the Returning Officer. Section 100 (1) (*d*) (iii) refers to improper reception, refusal or rejection of any vote by the Returning Officer. The propriety or impropriety to be considered is that of the decision of the Returning Officer. Section 36 (2) requires the Returning Officer to decide all objections after a summary enquiry, if any. The final rejection, if the Returning Officer orders it, has to be based on an enquiry and the decisions taken on the basis of that enquiry. Whether the objections are those formulated by any of those who could be present at the time of the scrutiny under the provisions of section 36 (1) or whether they are objections taken by the Returning Officer *suo motu*, section 35 (2) requires those objections to be decided. Section 36 (6) requires that an order of rejection should be supported by a brief statement of the reasons on which the rejection was based. It is at least a quasi-judicial determination of a statutory legal right of a person to stand as candidate for election. In *Shri Virindar Kumar Satyawadi* v. *The State of Punjab*[2] the Supreme Court said the

" function of the Returning Officer acting under section 36 is judicial in character, but he is not to act judicially in discharging it ".

In such a context it seems to us that the word " improper " has to be construed as " wrong, inaccurate or incorrect ". If under section 100 (1) (*c*) the Tribunal is called upon to decide whether the rejection of a nomination by the Returning Officer was improper, the Tribunal has to decide whether the decision of the Returning Officer was incorrect. That decision has to be reached by the Tribunal after a trial, as against a summary enquiry which alone is permissible to a Returning Officer under section 36 (2). We come back to the question, what is the scope of that trial in which the correctness of the decision of the Returning Officer rejecting a nomination could be canvassed.

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1. (1956) S.C.J. 368: (1956) 1 M.L.J. (S.C.) 169: (1956) An.W.R. (S.C.) 162.
2. (1955) 2 S.C.R. 1013 at 1019 : (1956) S.C.J. 138.

Our attention has not been drawn to any reported case directly in point where the Supreme Court expressly decided such a question.

Section 100 (1) (*c*) as it stood before it was amended by Act XXVII of 1956 ran:

"If the Tribunal is of opinion that the result of the election has been materially affected by the improper acceptance or rejection of any nomination, the Tribunal shall declare the election to be wholly void".

In *Vashist Narain Sharma* v. *Dev Chandra and others*[1] one of the questions that arose was whether the nomination of Dudh Nath, who was eventually defeated at the poll, was improperly accepted by the Returning Officer. At the time of the scrutiny of nominations, objection was taken to the validity of the nomination of Dudh Nath. No proof was given in support of the objection. The Returning Officer overruled the objection and held that the nomination of Dudh Nath was valid. After setting out the contentions which ran :

Mr. Daphtary on behalf of the appellant has argued before us with reference to the provisions of sections 33 and 36 that this is not a case of improper acceptance of the nomination paper, because *prima facie* the nomination paper was valid and an objection having been raised but not pressed or substantiated, the Returning Officer had no option but to accept it. There was, as he says, nothing improper in the action of the Returning Officer. On the contrary, it may, according to him, be more appropriately described as a case of an acceptance of an improper nomination paper by the Returning Officer, inasmuch as the nomination paper contained an inherent defeat which was not discernible *ex facie* and could be disclosed only upon an enquiry and upon the taking of evidence as to the identity which was not then forthcoming. Such a case, it is argued, is not covered by section 100 (1) (*c*) but by section 100 (2) (*c*) in which case the election of the returned candidate is alone to be declared void, whereas in the former case the election is wholly void".

Ghulam Hasan, J., observed :

"We do not propose to express any opinion upon this aspect of the matter, as in our view the appeal can be disposed of on the second question".

No reference was made in *Vashist Narain Sharma* v. *Dev Chandra and others*[1] to the decision in *Durga Shankar Mehta* v. *Thakur Raghuraj Singh and others*[2] decided by another Bench of the Supreme Court the previous day. It was established at the trial of the election petition in *Durga Shankar Metha's case*[2] that Vasant Rao, one of the returned cnadidates, was below 25 years of age and was therefore not qualified to stand as a candidate. Such an objection however had not been taken at the time of the scrutiny of nominations, and there was therefore no occasion for the Returning Officer to decide under section 36 (2) whether Vasant Rao's nomination was liable to be rejected. Mukerjea, J., delivering the judgment of the Bench held at page 277 :

"But when the candidate appears to be properly qualified on the face of the electoral roll and the nomination paper and no objection is raised to the nomination, the Returning Officer has no other alternative but to accept the nomination."

It was in continuation of that that the learned Judge observed at pages 277-78:

"As no objection was taken to his nomination before the Returning Officer at the time of scrutiny, the latter was bound to take the entry in the electoral roll as conclusive ; and if in these circumstances he did not reject the nomination of Vasant Rao, it cannot be said that this was an improper acceptance of nomination on his part which section 100 (1) (*c*) of the Act contemplates. It would have been an improper acceptance, if the want of qualification was apparent on the electoral roll itself or on the face of the nomination paper and the Returning Officer overlooked that defect or if any objection was raised and enquiry made as to the absence of qualification in the candidate and the Returning Officer came to a wrong conclusion on the materials placed before him. When neither of these things happened, the acceptance of the nomination by the Returning Officer must be deemed to be a proper acceptance. It is certainly not final and the Election Tribunal may, on evidence placed before it, come to a finding that the candidate was not qualified at all. But the election should be held to be void on the ground of the constitutional disqualification of the candidate and not on the ground that his nomination was improperly accepted by the Returning Officer."

We do not understand this to be a conclusive pronouncement on the question what is the scope of the trial before a Tribunal in a case where on an objection

1. (1955) 1 S.C.R. 509 : (1954) S.C.J. 717 : (1954) 2 M.L.J. 379 (S.C.).

2. (1955) 1 S.C.R. 267 : (1954) S.C.J. 723: (1954) 2 M.L.J. (S.C.) 385 (S.C.).

taken the Returning Officer gave a decision under section 36 (2) of the Act rejecting a nomination. We are fortified in this conclusion by the Supreme Court expressly leaving open the question in the later decision *Vashist Narain Sharma* v. *Dev Chandra and others*[1], what could be proved at the trial as constituting an improper acceptance of the nomination of a candidate other than a returned candidate.

The propriety of the reception of a set of votes had to be considered by the Supreme Court in *Hari Vishnu Kamath* v. *Syed Ahmed Ishaque and others*[2]. That question is now covered by section 100 (1) (*d*) (iii) of the Act as it has been amended. The contention in *Hari Vishnu Kamath* v. *Syed Ahmad Ishaque and others*[2], based on the analogous provision, section 100 (2) (*c*) as it stood before the Act was amended, which the Supreme Court had to consider, was :

> " Mr. Chatterjee. . . . . . contends that the enquiry under that section must be limited to the matters raised in the election petition, and that as there was no complaint about the breach of Rule 23 in that petition, it was outside the scope of the enquiry."

The learned Judges observed :

> " It is unnecessary to consider whether it was open to the Tribunal to enquire into matters other than those set out in the petition, when the returned candidate merely seeks to support the declaration."

They pointed out that in the case before them there was a recrimination petition presented under section 97 of the Act. At page 1132 the learned Judge observed with reference to rule 47 (4) :

> " Under this provision, the Tribunal is constituted a Court of appeal against the decision of the Returning Officer and as such its jurisdiction must be co-extensive with that of the Returning Officer and cannot extend further."

But the absence of such an express provision could make no difference to the principle that on such an issue as the improper acceptance or rejection of nomination the jurisdiction of the Tribunal is co-extensive with that of the Returning Officer, the difference made by the Act itself being that the enquiry open to the Returning Officer is summary in its scope, while the issue has to be decided by the Tribunal after a trial held as nearly as possible in accordance with the provisions of the Civil Procedure Code.

As pointed out by the Supreme Court in *Durga Shankar Metha's Case*[3], no question of the impropriety of a decision accepting a nomination can arise for consideration at the trial of an election petition, when no objection was taken at all at the proper stage, the scrutiny of nominations, and the Returning Officer had no occasion to decide that the objection was not well founded. Whether an objection is taken either *suo motu* by the Returning Officer, or by anyone entitled to prefer an objection at the appropriate stage of the scrutiny of nomination, the Returning Officer has to give a decision. We shall confine ourselves to the question that arises in the proceedings before us, where objections were taken to a nomination, whether it was a case of an improper rejection of a nomination. Other considerations may possibly arise in other circumstances. If the nomination is rejected by the Returning Officer, it should be on the ground that the objection is well founded in the opinion of the Returning Officer. It is the correctness of that decision that is open to review by the Tribunal at the trial of an election petition presented for that purpose. What the Returning Officer and at the later stage, the Tribunal, have to determine is the same question : Are the objections to the nomination well founded, that is, are those objections true and valid ? What is the scope of the evidence permissible to sustain or to rebut those objections is however a different question. Since only a summary enquiry is contemplated before the Returning Officer gives his decision, and the time at the disposal of the parties is so short, it may well be that neither the objector nor the candidate, the validity of whose nomination

1. (1955) 1 S.C.R. 509 : (1954) S.C.J. 717 : (1955) 1 M.L.J. (S.C.) 157 (S.C.).
2. (1955) 1 S.C.R. 1104 : 1955 S.C.J. 267 : (1954) 2 M.L.J. 385 (S.C.).
3. (1955) 1 S.C.R. 267 : (1954) S.C.J. 723 : (1954) 2 M.L.J. 379 (S.C.).

has been challenged, nor both, placed all the material available to them before the Returning Officer in that summary enquiry, to sustain or rebut the objection. A trial affords a full opportunity to both the parties to marshal all their evidence. Though in form what the Tribunal has to decide is whether the Returning Officer's rejection was improper, the real question the Tribunal has to decide is the same as what the Returning Officer had to decide: Did the objector establish the truth and the validity of his objections? We are not to be taken as having even considered the question of burden of proof at either the stage of summary enquiry or the trial. We are only focussing attention on the question for determination by the Tribunal. The correctness of the decision of the Returning Officer, which the Tribunal has to consider, is with reference to the objections the Returning Officer had to consider, but on the fuller material which a trial enables the parties to place before the Tribunal. It is the objection formulated for decision at the appropriate stage of scrutiny of nominations that limits the scope of the investigation both in the summary enquiry before the Returning Officer and at the trial before the Tribunal. At both stages the parties should be confined to the objections, which alone the candidate, the validity of whose nomination was challenged, had or could have had an opportunity to answer before the Returning Officer. In other words, it is not open to the respondent to an election petition, whether or not he was the person who had formulated the objection with reference to which the Returning Officer gave his decision, to establish that the candidate whose nomination was rejected could have been disqualified on grounds other than those which the Returning Officer was called on to consider and decide.

As the learned Advocate-General pointed out, where the Legislature intended to enlarge the scope of an investigation into the question, whether a candidate was in fact disqualified, express provision was made as in section 100 (1) (*a*) of the Act. That is confined to the returned candidate. It has nothing to do with any decision of a Returning Officer. It has nothing even to do with the stage of the scrutiny of nominations. The relevant date for purpose of section 100 (1) (*a*) is the date of election, which is fixed with precision by section 67-A of the Act.

Mr. Mohankumaramangalam, the learned Counsel for the first respondent, urged that if in fact it could be proved at the trial before the Tribunal that the fourth respondent was disqualified at the stage of nomination even if it be on grounds other than the objections on the basis of which the Returning Officer rejected the nomination of the fourth respondent, factually the decision of the Returning Officer could be proved to be correct and therefore not improper. A further submission was, that to shut out such evidence at the trial would be to penalise the returned candidate who was himself, as in the present case, in no way responsible for the decision of the Returning Officer, which was challenged subsequently as improper. The learned Counsel pleaded that it should be open to the first respondent, as the returned candidate, to prove at the trial that the rejection of the fourth respondent's nomination was correct, though on grounds other than those advanced by the second respondent at the stage of the scrutiny of nominations. The plea may sound plausible, but we are unable to accept it. Though it may not be the test to apply, suppose in this case, instead of the second respondent objecting to the nomination of the fourth respondent, it was the first respondent, the returned candidate himself who had preferred the objections which were upheld by the Returning Officer. In such circumstances could the returned candidate claim that it was open to him to support the decision of the Returning Officer on grounds other than those which he himself had invited the Returning Officer to consider and decide? If we start with this position, that where no objection was taken and no decision was given by the Returning Officer, there could be no occasion for the Tribunal to consider any impropriety of a decision, it should follow that, when objection was taken before the Returning Officer and decided by him there could be no question of an improper "decision" on another objection possible at that stage but not put forward at all for the Returning Officer to consider. The question of propriety or impropriety of the decision of the Returning Officer has to be determined only with reference to the objection which the Returning Officer purported to consider and decide

Who preferred those objections at that stage would be immaterial in the ultimate determination by the Tribunal of the issue, whether those objections which were considered and decided by the Returning Officer were well-founded.

Mr. Kumaramangalam referred to *Bhikaji Keshao* v. *Brijlal Nandlal*[1]. At page 619, Jagannadha Das, J., observed :

> " Having regard to the nature of the alleged disqualification, which is substantially to the effect that the returned candidate had interest in contracts with the Government at the relevant dates, it was very necessary that the matters should have been cleared up in the enquiry before the Election Tribunal. It is not in the interest of purity of elections that such allegations of disqualification should be completely ignored without enquiry and it appears rather surprising that the Tribunal should have ignored them and exercised its power to dismiss the petition."

That however dealt with a case which would now fall directly under section 100 (1) (*a*) of the Act, confined to the returned candidate. What we have now to consider is whether fresh grounds of disqualification could be urged against a candidate whose nomination was rejected.

Mr. Kumaramangalam placed considerable reliance, even as the Tribunal did, on *Tej Singh* v. *Election Tribunal, Jaipur*[2]. Dealing with the plea that objections advanced by the returned candidate before the Tribunal other than those put forward before the Returning Officer should not be investigated at the trial, the learned Judges referred to the provisions of section 36 (2) of the Act and proceeded at page 206 :

> " The nomination paper is thus liable to be rejected on any one or more of the five grounds, and this can be done either on objection or *suo motu* by the Returning Officer. It is conceivable that there may exist more than one defect, but the Returning Officer may consider the objection to be justified on only one of the objections and may refuse the nomination on that ground alone. But the candidate who wishes to call in question the election which may be held subsequently on the ground that his nomination paper was improperly rejected has to aver his due nomination as a candidate, and that allegation involves an averment that the nomination paper did not suffer from any of the defects mentioned in clauses (*c*) to (*e*) of sub-section (2) of section 36. It is only when such candidate can prove that he had been duly nominated that the Election Tribunal can come to the finding that his nomination paper had been improperly rejected. In our opinion, therefore, the respondent to an election petition is entitled to raise a plea that the nomination paper, though rejected on one ground by the Returning Officer, was defective on one or more of the other grounds mentioned in section 36 (2), and such plea, if taken, has to be enquired into by the Election Tribunal".

With all respect to the learned Judges, we are not able to agree with the line of reasoning or with the final conclusion. What an election petitioner has to aver with reference to section 100 (1) (*c*) is primarily that the rejection of the nomination of the candidate in question was improper. That rejection was based on the decision of the Returning Officer. We come back to the question : What was it the Returning Officer decided? That decision was with reference to the objections put forward before him which he had to consider. In alleging the impropriety of the decision with reference to those objections, the election petitioner has necessarily to aver that those objections were untenable, that is, they were not true or valid. We do not consider that section 100 (1) (*c*) imposes a further liability on the election petitioner to aver that the candidate whose nomination was rejected was in no way disqualified. The election petitioner is not called upon to meet in advance possible objections, objections not taken at the appropriate stage before the Returning Officer. Section 83 (1) (*a*) requires that an election petition shall contain a concise statement of the material facts on which the petitioner relies. The primary material fact is the decision of the Returning Officer, and the primary plea is that that decision was improper. We have to repeat that the decision has necessarily to be correlated to the objections taken before the Returning Officer on the basis of which he gave his decision.

In our opinion the wider scope of section 100 (1) (*c*) for which Mr. Kumaramangalam pleaded is not permissible.

We are clearly of opinion that the enquiry before the Tribunal must be restricted to the objections which the Returning Officer had to consider and decide,

1. A.I.R. 1955 S.C. 611 at 619.   2. A.I.R. 1954 Rajasthan 204.

but not necessarily to the material placed before the Returning Officer at the stage of the summary enquiry. The Tribunal has jurisdiction to adjudicate upon the truth and validity of those objections on relevant material even if that material be other than that placed before the Returning Officer. The Tribunal has no jurisdiction to investigate the truth or validity of the objections which were not put forward before the Returning Officer, and which he had therefore no occasion to consider. Once again we have to point out that we are discussing only the position of a candidate whose nomination was rejected, and not for instance, that of a returned candidate.

In view of what we have recorded above, it should be clear that the dimissal of I.A. No. 5 of 1957, which was presented by the petitioner to the Tribunal led to an assumption of jurisdiction which the Tribunal did not have.

The next contention of Mr. Kumaramangalam was that, since the issue of a writ under Article 226 of the Constitution was at the discretion of this Court, the discretion should be exercised against the petitioner, the error if any, committed by the Tribunal could be corrected, if necessary in the appeal for which section 116-A of the Act provides. We have discussed this question in full in W.P. Nos. 611 and 668 of 1957; *Muthia Chettiar* v. *Sa. Ganesan*[1], and and we are of the opinion that writs should issue in these cases to prevent the exercise of a jurisdiction which the Tribunal, in our opinion, did not have at all.

The rule *nisi* issued in W.P. No. 675 of 1957 will be confirmed and a writ of *certiorari* will issue to set aside the order of the Tribunal in I.A. No. 5 of 1957.

It was a writ of prohibition or any other appropriate writ that was asked for in W.P. No. 676 of 1957. In our opinion the appropriate writ would be one of *mandamus*, directing the Tribunal to dispose of I.A. No. 5 of 1957 afresh in accordance with the law on the subject which we have endeavoured to explain in this judgment.

There will be no order as to costs in either of these petitions.

R.M. ——— *Petitions allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

(Special Original Jurisdiction.)

PRESENT :—MR. JUSTICE RAJAGOPALA AYYANGAR.

V. Guruviah Naidu and brothers .. *Petitioners**

v.

The State of Madras represented by the Secretary to Government Revenue Department and another .. *Respondents.*

Madras General Sales Tax Act (Act IX of 1939). section 5 (vi) *and Madras General Sales Tax Rules, Rule* 5 (*as amended*) *and Turnover and Assessment Rules, Rule* 16 (*as amended*) *and section* 9 *of Act I of* 1957—*Expression ' Prescribed ' in the Act—Whether connotes only prospective and not retrospective operation of the Rules—Whether the rules violate Article* 14 *of the Constitution—Whether the Rules violate the basic principle of single point taxation under section* 5 (vi) *of the Act.*

The petitioners carrying on business as tanners and dealers in hides and skins got themselves registered as licensed dealers from the commencement of the General Sales Tax Act upto the end of the financial year (1951-1952). They did not choose to take out license from and after 1st April, 1952. It was held in *Noor Mohammad & Co.* v. *State of Madras*, (1956) 2 M.L.J. 374 that under Rule 16 (2) an unlicensed dealer in untanned hides and skins was not liable to pay tax on a sale turn over under the provisions of the Madras General Sales Tax Act, 1939. Rule 5 of the Madras General Sales Tax Rules was amended by a notification in June 1955 so as to render taking out of a license compulsory. This amendment delinked the taking out of a license with a right to claim the benefit of single point taxation under section 5 of the Act.

Rule 16 of the Turnover and Assessment Rules was also amended by a notification G.O. No. 2733, Revenue, dated 3rd September, 1955. In terms these rules were made retrospective and to have effect as and from 1st April, 1955.

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1. Since reported (1958) 1 M.L.J. 110.

* W.P. Nos. 625 and 626 of 1956. 14th October, 1957.

The Deputy Commercial Tax Officer issued a notice to the petitioner on 23rd November, 1955 requiring the latter to submit returns as required by the amended rules. On the question of the validity of the amended rule,

Held, The use of the word 'prescribe' as the normal expression for conferring a power to make a rule is too well known to require detailed explanation. The word 'prescribed' in the Act merely means 'by rules made under the Act' and is wholly unconcerned with the content of the rule in relation to the time from which it shall operate which is determined by other considerations. It cannot be said that the use of the word 'prescribed' in section 5 (*vi*) imposed a restriction on the rule making authority and confined its power to fixing a single point only for the future.

The State Government by Madras Act I of 1957 repealing section 7 of the Ordinance I of 1957 has put the matter beyond the possibility of any such objection. As the objection to the validity of the rule was confined to its disconformity to the provisions of the Act, the express confirmation of the rules and the validation of the assessments render the rule legal and in force at the relevant period.

The competence of the State Legislature to enact taxing legislations with retrospective effect is not disputed. If so, a provision which in terms rendered unlicensed dealers in hides and skins liable to tax on the same footing as licensed dealers could in no wise be termed a violation of Article 14 of the Constitution. On the other hand far from being unequal or discriminatory such an enactment would be one calculated to remove inequality in the operation of the relevant fiscal system as regards licensed and unlicensed dealers in the same commodity. No person had any vested or fundamental right to the continuance of a lacuna (which Rule 16 as unamended contained) and that such person could not with justice complain that any right of his was violated when that lacuna was set right.

The two modes in which untanned hides and skins might be found in the State are (1) they might originate in the State and (2) they might be imported from outside the State as untanned hides and skins. These might be dealt with in one of two modes: (*a*) they might be tanned within the State and (*b*) they might get exported after successive transactions of sale as untanned hides and skins.

Rule 16 (1) is the provision applicable to untanned hides and skins. The tax point as regards these are at the stage of the last purchase, that is the last purchase before tanning or the last purchase before export. If tax had been paid at this point, in case they are exported there could be no further levy under the Madras General Sales Tax Act.

As regards tanned goods they may originate in the State in its finished condition or may be imported from outside the State as tanned goods. Under rule 16 (1) where the goods are imported from outside, the first sale after the import is the point prescribed the tax liability falling on the first seller. The buyer in this transaction and all subsequent dealers in the goods are not taxed on their transactions and hence the requirement of single point is satisfied. In the case of hides and skins tanned within the State whatever be the source from which the goods in their raw condition were obtained rule 16 (2) (*ii*) prescribes the first sale after tanning as the point at which tax is levied. In this case it would be seen that the goods have borne tax at the stage of the purchase by the tanner and therefore there would be a multiple point taxation if rule 16 (2) (*ii*) operated without qualification. But its operation is controlled by its proviso under which in the case of such dealers who might be termed tanner-dealers the amount of tax paid by them at the purchase point is allowed as a deduction in the computation of their liability under rule 16 (2) (*ii*). The effect of the proviso therefore in respect of those hides and skins tanned by such dealers is as if to impose a tax on the first sale point.

Rules 16 as framed satisfies the requirements of section 5 (*vi*) of the Act regarding the prescription of a single point for the levy of tax on hides and skins whether tanned or untanned.

If the dealer had taken out a license he may take advantage of the benefits provided by the Act. But the absence of these advantages would not render the rules invalid.

Petition under Article 226 of the Constitution of India, praying that in the circumstances stated therein, and in the affidavit filed therewith the High Court will be pleased to issue a Writ of *Certiorari* calling for the records relating to the assessment proceedings in Asst. No. 2385/55-56 of the Deputy Commercial Tax Officer (2) Coimbatore 2, and quash the same.

K. V. Venkatasubramania Iyer and *T. T. Shrinivasan*, for the Petitioner.

The Advocate-General (*V. K. Thiruvenkatachari*) and the Additional Government Pleader (*K. Veeraswami*), for the Respondents.

The Court made the following order :—

ORDER.—*W. P. Nos.* 625 *and* 626 *of* 1956.—The petitioner is a dealer in hides and skins who has been assessed to sales-tax under the Madras General Sales Tax Act and he has filed these two petitions for the issue of writs of *certiorari* and *mandamus*, *certiorari* to quash the order of assessment and *mandamus* to direct the taxing authorities to forbear from enforcing the provisions of the Act for the reason that the assessment proceedings are *ultra vires* and therefore, illegal.

V. Guruviah Naidu and Brothers the petitioners carry on business as tanners and dealers in hides and skins in Coimbatore. To enable them to deal in those

goods they got themselves registered as licensed dealer from the commencement of the Madras General Sales Tax Act right up to the end of the financial year 1951-52. They did not choose to take out license from and after 1st April, 1952. Taking out of such licenses was not obligatory under the relevant provisions of the Madras General Sales Tax Rules, 1939, until they were amended recently and it is the validity of these amendments that is in controversy in these petitions. Before the amenment, Rule 5 of the Madras General Sales Tax Rules provided :

> "that every person who deals in hides or skins whether tanned or untanned........shall if he desires to avail himself of the exemption provided in sections 5 and 8 or of the concession of taxation only at a single point or of taxation at the rate specified in section 5 submit an application in Form 1 for a licence in respect of each of his places of business to the authority specified in sub-rule (2)........................"

Rule 16 (2) of the Madras General Sales Tax (Turnover and Assessment) Rules, 1939 which fixed the single point at which tax in respect of hides and skins could be levied enacted—

> "No tax shall be levied on the sale of untanned hides or skins by a *licensed dealer* in hides or skins except at the State at which such hides or skins are sold to a tanner in the State or are sold for export outside the State".

It is unnecessary to refer to the other sub-clauses of rule 16 but is sufficient to say that this Court held in *Noor Mohammed and Co.* v. *State of Madras*[1], that under rule 16 (2) an *unlicensed dealer* in untanned hides and skins was not liable to pay tax on his sale turnover under the provisions of the Madras General Sales Tax Act, 1939.

The result of this decision was that unlicensed dealers in hides and skins escaped sales-tax altogether which was of course, not the intention of either the Act or the framers of the Rules. The State Government took steps to remedy this state of affairs. In the first place Rule 5 of the General Sales Tax Rules was amended by a notification published in June, 1955 so as to render taking out of a licence compulsory. After the amendment Rule 5 (1) read

> "Every person who deals in hides and/or skins whether as a tanner or................shall in case turnover in any year in any of the said goods is not less than Rs. 7,500 submit an application in Form I for a licence in respect of each of his places of business to the authority specified in sub-rule (2)...".

This amendment delinked the taking out of a licence with a right to claim the benefit of single point taxation under section 5, a matter which had been commented upon in some of the decisions of this Court.

Rule 16 of the Turnover and Assessment Rules which by reason of the use of the expression "Licensed dealer" had led to the result reached in *Noor Mahomed's Case*[1] also underwent change. By a notification G.O. No. 2733, "Revenue" dated 3rd September, 1955, Rule 16 was amended and after the amendment it read :—

> *Rule* 16 (1).—In the case of untanned hides and/or skins the tax under section 3 (1) shall be levied from the dealer who is the last purchaser in the State not exempt from taxation under section 3 (3) on the amount for which they are bought by him.
>
> (2) (i) in the case of hides or skins which have been tanned outside the State the tax under section 3 (1) shall be levied from the dealer who in the State is the first dealer in such hides or skins not exempt from taxation under section 3 (3) on the amount for which they are sold by him.
>
> (ii) In the case of tanned hides or skins which have been tanned within the State the tax under section 3 (1) shall be levied from a person who is the first dealer in such hides or skins not exempt from taxation under section 3 (3) on the amount for which they are sold by him :
>
> Provided that, if he proves that the tax has already been levied under sub-rule (1) on the untanned hides and skins out of which the tanned hides and skins had been produced he shall not be so liable.
>
> (iii) The burden of proving that a transaction is not liable to taxation under this rule shall be on the dealer.

In terms, these rules were made retrospective and to have effect as and from 1st April, 1955. The Deputy Commercial Tax Officer, Coimbatore, issued a notice to the petitioner on 23rd November, 1955 requiring the latter to submit returns as required by the amended rules. The notices went on to state that if the petitioner failed to submit his return he would be assessed to tax on "best Judgment

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1. (1956) 2 M.L.J. 374 : 7 S.T.C. 729.

basis." Further notices were served on the petitioner and a demand was also made for the payment of tax as provisionally assessed as provided for by the rules. Of course at the end of the year if the turnover was more or less the tax paid or payable would be adjusted on this basis under Rule 15 (6) of the Turnover and Assessment Rules. The petitioner thereupon moved this Court for the issue of rules *nisi* in these two petitions and such rules having been issued further proceedings have stood stayed with the result that the final amount of tax payable by the petitioner has not yet been determined.

The main contention strenuously urged by Mr. Venkatasubramania Iyer, learned Counsel for the petitioners was that the retrospective amendment of Rule 16 was *ultra vires* as beyond the rule-making power conferred on the State Government by the provisions of the Madras General Sales Tax Act. Mr. Venkatasubramania Iyer addressed a very interesting and, if I may be pardoned for saying so, an over-subtle argument based on the meaning of the expression "prescribed" employed in the relevant provisions. The etymological or dictionary meaning of the expression "prescribed" was "to write first" derived from the words, "pre" before and "scribe" to write. The argument was that by the use of this expression in the crucial provisions of the enactment to which I shall immediately advert the Legislature had expressly contraindicated the making of a retrospective rule.

Section 5 (*vi*) to give effect to which Rule 16 has been framed enacts:

"5. Subject to such restrictions and conditions as may be prescribed, including conditions as to licences and licence fees;

(*vi*) the sale of hides and skins, whether tanned or untanned shall be liable to tax under section 3, sub-section (1), only at such single point in the series of sales by successive dealers as may be *prescribed*".

Similar expressions were used in the other relevant provisions, for instance section 3 (4) which ran:

"For the purpose of this section and the other provisions of this Act, turnover shall be determined in accordance with such rules as may be prescribed."

Again sub-section (5) of the same section enacted:

"The taxes under sub-sections (1) and (2) shall be assessed, levied and collected in such manner and in such instalments, if any, as may be *prescribed*."

Learned Counsel contended that "prescribed" indicated that the "prescription" could operate only for the future and that there was thus a compelling etymology which ought to be sufficient to force the Court to the view that retrospective rule "prescribing" the points at which tax should be levied was prohibited.

Learned Counsel did not dispute that as a general proposition that the Legislature might by specific enactment retrospectively impose a tax. He did not even contest the proposition that rules made under statutes might, if so expressed, validly be made to operate with retrospective effect. These are not really concessions by Counsel but are established law and therefore the argument addressed to me has to be judged in the light of these principles. Learned Counsel might be right in the etymological connotation of the expression "prescribed". But the use of the word "prescribe" as the normal expression for conferring a power to make a rule is too well known to require detailed explanation. For instance in this very Act, section 2 (*f*) defines the word "prescribed" thus: "prescribed" means "prescribed by rules made under this Act" and when one turns to section 19 where power is expressly conferred on the State Government to make rules under the Act, it is specifically enacted:

"19. (2) In particular and without prejudice to the generality of the foregoing power, such rules may provide for

(*a*) all matters expressly required or allowed by this Act to be prescribed."

The reference to prescription here, if read in the light of the definition in section 2 (*f*) can only mean "by rules made under the Act". I am therefore, clearly of the opinion that "prescription" in the Act merely means "by rules made under the Act" and is wholly unconcerned with the content of the rule in relation to the time from which it shall operate which is determined by other considerations.

I, therefore, reject the argument that the use of the word "prescribed" in section 5 (*vi*) imposed a restriction on the rule-making authority and confined its power to fixing a single point only for the future.

Further even if Counsel were right in his submission that section 5 (*vi*) did not authorise the rule-making authority to prescribe a tax-point with retrospective effect, this is of no avail to the petitioners, because of the action taken by the State Government by enacting appropriate legislation in that behalf to put the matter beyond the possibility of any such objection.

The Governor of Madras promulgated an ordinance, Ordinance (I of 1957), published in the *Fort St. George Gazette*, dated March 22, 1957. Section 7 of this Ordinance enacted :

Validation of certain assessment and levy of licence fees for the year 1955-56.—Tax may be assessed or collected and licence fees levied or collected for the year 1955-56 notwithstanding the retrospective operation of the amendments to the Madras General Sales Tax Rules, 1939 and the Madras General Sales Tax (Turnover and Assessment) Rules, 1939 and all assessments made, taxes collected and licence fees levied for the year 1955-56 shall be deemed to have been made, collected or levied as the case may be, as if those rules as amended were in force at all relevant times :"

This was followed by a proviso which is not relevant to the present context and which is, therefore, omitted.

This was repealed and enacted by Madras Act I of 1957 and its section 9 replaced section 7 extracted above and in the same terms. If the attack on the validity of the amendment of the rule was based upon any ground other than its non-conformity on the limits of the rule-making power, for instance, if the objection had been that the rule was beyond the legislative competence of the State Legislature or was unconstitutional and that objection was sustained the validation by the Legislature would not have served to impart legality to the rule. As however, the objection to the validity of the rule in the present case was confined to its disconformity to the provisions of the Act, the express confirmation of the rules and the validation of the assessments render the rule legal and in force at the relevant period.

I might pause here to mention that Mr. Venkatasubramania Iyer confined his attack on the invalidity of the rule, to the tax liability before 3rd September, 1955, in other words only to the period as to which the rule was made retrospective by specific provision therefor. In these circumstances I hold that the objection raised by the learned Counsel even if it has any force has to be repelled after the enactment of section 9 of the Madras Act 1 of 1957.

Learned Counsel, however, urged that provisions of Act 1 of 1957 were obnoxious to Article 14 of the Constitution. This objection was formulated in these terms :—The Madras General Sales Tax Act still holds the field. Under it there must be "a prescription of a single point" before tax liability is attracted in respect of dealings in hides and skins. There was factually no such prescription between the period, from 1st April, 1955 to 3rd September, 1955 in respect of sales by unlicensed dealers. The Rules framed and notified on 3rd September, 1955 however, made an inroad into this state of affairs and laid a tax on such sales by prescribing a point at which tax could be levied even in regard to licensed dealers. From and after 3rd September, 1955 tax is levied only at prescribed stages or at prescribed points in successive transactions of the commodity. In regard, however, to the period, from 1st April, 1955 till 3rd September, 1955 notwithstanding that there was no point prescribed, tax liability was made to emerge in the case of unlicensed dealers by reason of the rule having retrospective operation which the Act has confirmed. The effect, therefore, of section 9 in the light of the provisions of the Madras General Sales Tax Act was that whereas from and after 3rd September, 1955 all unprescribed points in sales, or "unprescribed sales" were exempt from tax, during the period from 1st April, 1955 to 3rd September, 1955 dealings by unlicensed dealers which were not "prescribed sales" by antecedent rules were brought within the range of taxation under Rule 16. This is an unreasonable discrimination against unlicensed dealers. This argument was also urged in a slightly different form by saying that

section 9 of the Act afforded an exceptional or discriminatory treatment to sales for a period of one year from April, 1955 till the end of March, 1956.

I am clearly of the opinion that this argument of the learned counsel is not well-founded. The situation which faced the State Government was this :—

Most of the dealers in this State—over ninety per cent. had registered themselves under the Act and had taken out licences as dealers and were paying the tax levied under the Act when their transactions were brought within the points prescribed by Rule 16 of the Turnover and Assessment Rules. Such registration of the licensees was a very essential machinery for the purpose of tracing transactions in hides and skins which were liable to tax only at a single pre-determined point. A few dealers, however, had failed to take out licences which rather upset the general scheme of the administration of the tax. Apart from this dislocation of the proper administration of the tax system, this small minority of dealers not merely did not pay licence fees but on the strength of the decisions of this Court had obtained practically exemption from tax liability. Licensed dealers had complained that this acted unequally on them and rendered them to tax liability from which those who deliberately failed to take out licences escaped (this not being compulsory under the provisions of Rule 5 as it then stood) and was illegal as being unfairly discriminatory against them. This contention was rejected by the Sales Tax Tribunal and this Court affirmed that decision. The net result of this was that while licensed dealers paid both licence fees as well as sales tax on their transactions, unlicensed dealers did neither. It was this state of affairs, that was brought to an end by the amendment of the Rules effected in 1955 which was followed by section 9 of the Madras Act I of 1957. Viewed in the light of this antecedent history I am unable to appreciate the complaint that unlicensed dealers were unjustly discriminated against by section 9. The competence of the State Legislature to enact taxing legislations with retrospective effect is not disputed. If so, a provision which in terms, rendered unlicensed dealers in hides and skins liable to tax for period from and after 1st April, 1955, on the same footing as licensed dealers could in no wise be termed a violation of Article 14 of the Constitution. On the other hand, it would be an enactment designed to effect equality between all dealers in that commodity, licensed and unlicensed. Such an enactment, therefore, far from being unequal or discriminatory would be one calculated to remove inequality in the operation of the relevant fiscal system. The learned Advocate-General who appeared for the respondents pointed out that Rule 16 of the Turnover and Assessment Rules as it stood before the recent amendment, contained an undesigned lacuna of which unlicensed dealers had taken advantage of and he urged that no person had any vested or fundamental right to the continuance of a lacuna and that such a person could not with any justice complain that any right of his was violated when that gap was closed. I consider this submission apposite and well-founded. I have, therefore, no hesitation in repelling the constitutional objection to the validity of section 9 of Act I of 1957. These were the only objections which were urged by the learned counsel for the petitioner in regard to the validation by Act I of 1957 of the retrospective operation of the Rule 16.

In regard to the prospective operation of the same rules the first contention which learned counsel urged was that the rule as now framed violated the basic principles of section 5 (*vi*); namely, fixation of a single point at which tax liability emerged with the consequence that it was *ultra vires* of the Act as it stands. That Rule 16 as amended imposed tax at multiple points in a series of sales of that commodity was sought to be made as follows :

Rules 16 (1) imposed tax at purchase point in the case of untanned hides and skins while sub-rule (2) (*ii*) levied tax at certain sale points in respect of the same hides and skins when they got tanned. Learned counsel argued that unless raw hides and skins were treated as a commodity different from tanned skins and hides (and learned counsel denied that they could be so treated). Rules 16 (1) and 16 (2) would both apply to the same commodity at different

stages with the result that there would be a plurality of tax points prescribed. In my judgment there is no substance in this objection. It is not necessary to decide whether on the scheme of the enactment and the Rules thereunder, raw hides and skins are a different commodity from tanned hides and skins. I shall assume that they are the same commodity and test the correctness of the argument that the Rules now impugned prescribe multiple points for the taxation of the same commodity. I shall start with untanned hides and skins. There are two modes in which untanned hides and skins might be found within the State :—

(1) They might originate in the State, that is, they might be obtained from sheep and cattle within the State or

(2) they might be imported from outside the State as untanned hides and skins. Untanned hides and skins thus obtained from either of these sources, might be dealt with in one of two modes :

(*a*) they might be tanned within the State or

(*b*) they might get exported after successive transactions of sale as untanned hides and skins.

Rule 16 (1) is the provision applicable to untanned hides and skins. In the four cases mentioned above which would be entire number of possible permutation and combination, the tax point is at the stage of the last purchase, that is, the last purchase before tanning or the last purchase before export. If tax has been paid at this point the question next to be determined is whether these hides and skins are or could be subject to tax at any subsequent stage under these rules. After this purchase point the two alternative contingencies that might happen to the goods are—(*a*) they get tanned within the State or (*b*) they are exported from the State. In the latter case obviously there could be no further tax levy under the Sales Tax Act. In the case where goods are tanned the tanner who bought raw hides or skins has paid the tax and has converted the commodity in his hands into "tanned hides or skins" which I shall next proceed to consider.

Just as in the case of untanned hides and skins the commodity in its tanned or dressed stage might originate in this State, or may be imported from outside the State in its finished condition. The tax point in the case of dealings in tanned hides and skins is prescribed by Rule 16 (2) (*ii*). Where the tanned goods are imported from outside, the case is governed by sub-rule (1) under which the first sale after the import is the point prescribed, the tax falling upon the first seller. The buyer in this transaction and all subsequent dealers in the goods are not taxed on their transactions and hence the requirement of a single point is satisfied. In the case of hides and skins tanned within the State, whatever be the source from which the goods in their raw condition were obtained, either locally or from outside the State, Rule 16 (2) (*ii*) prescribes the first sale after tanning, as the point at which tax is levied. In this case it would be seen that the goods have borne tax at the stage of the purchase by the tanner and therefore, there would be a multiple point taxation if Rule 16 (2) (*ii*) operated without qualification but it is not so. Its operation, is controlled by its proviso under which in the case of such dealers who might be termed "tanner-dealers" the amount of tax paid by them at the purchase point is allowed as a deduction in the computation of their liability under Rule 16 (2) (*ii*). The effect of the proviso, therefore, is as if to efface the tax of the purchase point, in respect of those hides and skins tanned by such dealers and to substitute for it, a tax on the first sale point.

In the above discussion I have omitted from consideration the complication introduced by reference to the dealer exempted from tax under section 3 (3) of the Act, in shifting the tax point either higher or lower down, because this is wholly irrelevant for considering the principle on which the Rules are based. In my judgment Rule 16 as framed satisfies the requirements of section 5 (*vi*) of the Act regarding the prescription of a single point for the levy of tax on hides and skins, whether tanned or untanned.

The second objection raised by the learned counsel was that by reason of the retrospective operation of Rule 16, by virtue of section 9 of the Madras Act I of 1957, the petitioner had been deprived of two advantages which he would have enjoyed if the rules had operated prospectively. It was urged that dealers like the petitioners were unable to take advantage of the proviso to Rule 16 (2) (*ii*) under which they could obtain rebate on the purchase tax paid by them when they purchased goods which they tanned. I am unable to appreciate this contention because the petitioner is a tanner and if he had purchased goods locally and had paid tax at that point surely he would be able to establish both the fact of his purchase as well as the payment of the tax and if he did so he would certainly be entitled to claim the rebate allowed by the proviso, and if he had paid no tax then, he can have no complaint.

The other advantage which the learned counsel contended the petitioner had been unjustly deprived of, by the retrospective operation of the rule, was that if the provision had operated prospectively he could have passed on the tax to purchasers from him. Under Rule 16 (4) as it stood before the amendment in September, 1955, tax was levied at sale point on dealers in hides and skins, the turnover being computed on the basis of the amount realised at the sales. It was the same rule that was re-enacted by Rule 16 (2) (*ii*). Therefore, those who had taken out licenses and who were being assessed to tax under the rules as they originally stood would have availed themselves of the benefit of Rule 5 (1) of the Turnover and Assessment Rules under which the sellers could collect tax from their purchasers. It was because the petitioner did not get himself licensed and did not pay any tax then that there was no occasion for him to pass on the tax to purchasers from him. In these circumstances I do not see any injustice or hardship created or casued to the petitioner. This apart, I am unable to see how the absence of this advantage to pass on the tax would invalidate the rule with which we are now concerned. Nor can it be said that the right to pass on the tax is an essential requirement of a tax on the sale of goods for a tax might be levied at the stage of the last purchase before consumption. I might add that a tax at purchase point which is legal does not enable this facility to be enjoyed by the tax payer.

Though in the affidavit in support of the petition some point was made of the assessment being on the basis of "best judgement" of the assessing authority Mr. Venktasubramania Iyer, learned counsel for the petitioner did not press this point in view of the fact that the assessment complained of in the petition was only provisional and was liable to adjustment on the basis of the turnover of the assessee computed at the end of the year.

The result therefore is that there are no merits in these petitions which fail and are dismissed. The *rules nisi* will be discharged. The respondents are entitled to their costs which is ordered in W.P. No. 625 of 1956. Counsel's fee Rs. 250.

V.S. —— *Rules nisi discharged and Writ Petitions dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

[Special Original Jurisdiction.]

PRESENT :—MR. JUSTICE RAJAGOPALAN AND MR. JUSTICE RAJAGOPALA AYYANGAR.

Kamaraj Nadar .. *Petitioner in W.P. Nos.* 531 *and* 532 *of* 1957*

v.

A. Kunju Thevar and others .. *Respondents in W. P. Nos.* 531 *and* 532 *of* 1957.

Representation of the People Act (*XLIII of* 1951) *as amended by Act* (*XXVII of* 1956), *section* 82 (*a*)—*Parties to an election petition—Whether the expression 'contesting candidates' includes candidates retiring under section* 55-*A* (2)—*Section* 117—*Deposit of security for costs—Requirements.*

* Writ Petition Nos. 531 and 532 and 573 and 574 of 1957. 24th September, 1957.

After a list of validly nominated candidates is prepared under section 36 (8) of the Act, section 37 provides that such candidates may withdraw their nominations before the day fixed for such withdrawal. Section 55-A (2) introduced by the Amending Act XXVII of 1956 provides that candidates may withdraw from the contest by giving a formal notice of retirement not later than ten days prior to the date fixed for the poll. On the question whether the expression 'contesting candidates' in section 82 (a) would include the retiring candidates under section 55-A (2),

Held : A candidate who had withdrawn from the contest under section 55-A (2) is not a 'contesting candidate' within the meaning of section 82 (a).

The expression 'contesting candidate' is not a popular one having any definite meaning.

Section 38 (1) cannot be treated in effect as a definition section. The scheme of the Act as disclosed by its provisions shows that definition clauses have been expressly introduced. Section 2 is in terms the interpretation section and the definitions contained in it have effect 'throughout the Act unless the context otherwise required.' The Act also contains other definitions which have application to particular chapters or particular sections or sub-sections. It would be seen from the various provisions of the enactment that whenever the framers of the Act considered that they were defining an expression they said so in express terms and also made clear the scope and operation of the definitions they introduced. Section 38 has to be read as merely laying down the duties of a Returning Officer at that stage. The expression 'contesting candidate' occurring subsequently has to be read in conjunction with and as modified by the provision as to retirement newly introduced by section 55-A (2). So understood the expression would mean that if the provision in question where the expression 'contesting candidate' occurs related to a point of time after the retirement it would exclude a retired candidate but if it related to a period anterior to that date it would mean any candidate whose name was included in the list published under section 38.

The terms of section 55-A(2) which refer to 'the retirement from the contest' and the fiction enacted in the nagative in section 55-A (5) do not render it possible or reasonable to draw the inference that section 55-A contains a positive provision that for all purposes other than that of section 52 the person who has given the notice of retirement shall be or shall be deemed to be a 'contesting candidate'.

Even in the absence of section 55-A (5) the expression 'contesting candidate' used in section 52 would mean a candidate who had not retired from the contest under section 55-A (2).

An examination of some of the other relevant provisions in the Act read in conjunction with the rules also points out to the fact that the expression would not include a retired candidate.

There is no reason why Parliament should have intended to insist upon the impleading of candidates who had retired, as parties to an Election Petition. If the expression to put it at the highest is ambiguous it would be a sound rule of construction to examine whether any purpose could be said to be served by the inpleading of such parties, before accepting the contention that the failure to implead them rendered the petition defective as not being in compliance with the provisions of section 82 and thereby rendering it liable to be rejected under section 85 or section 90 (3).

The purpose for which the deposit is intended to fulfil is a legitimate matter which can and ought to be taken into account in deciding as to whether there has been a compliance with section 117 or not. Notwithstanding the absence of the name of the secretary in the receipt the amount having regard to other entries in the receipt was treated as a credit to the Election Commission and was available to the respondent in the Election Petition. The Tribunal was right in holding that the terms of section 117 were complied with.

[The preliminary objection to the maintainability of the petitions under Article 226 of the Constitution to quash the orders of an interlocutary nature was not discussed in detail in view of the decision on the merits.]

Petitions under Article 226 of the Constitution of India praying that the High Court will be pleased to issue writs of *certiorari* calling for the records relating to the common Order in I.A. Nos. 1, 2 and 3 of 1957 in Election Petition No. 147 of 1957 on the file of the Election Tribunal, Madurai, dated 5th July, 1957 and quash the same and to issue a writ of *prohibition* prohibiting the Election Tribunal, Madurai, from holding any enquiry into E.P. No. 147 of 1957 and grant order of costs, etc.

M. K. Nambiar, *K. K. Venugopal* and *T. Martin*, for Petitioner in W.P. Nos. 531 and 532 of 1957.

T. S. Kuppuswami Ayyar and *V. Meenakshisundaram*, for first Respondent in W.P. Nos. 531 and 532 of 1957.

The Advocate-General (*V. K. Thiruvenkatachari*) with *M. N. Rangachari* and *S. Sethuram*, for Petitioner in W.P. Nos. 573 and 574 of 1957.

V. P. Raman, for first Respondent in W.P. Nos. 573 and 574 of 1957.

The Judgment of the Court was delivered by

Rajagopala Ayyangar, J.—These two sets of Writ Petitions arise out of proceedings for the setting aside of the election and other reliefs prayed for in two Election Petitions. These petitions before us are by the returned candidates and they have been heard together because some of the points raised in them are common.

W.P. Nos. 531 *and* 532 *of* 1957 are respectively for the issue of writs of *certiorari* and prohibition by the candidate who was declared elected at the election held for the single member Sattur Constituency of the Madras Legislative Assembly in January-March, 1957. W.P. No. 531 of 1957 seeks the quashing of the order of the Election Tribunal which held the Election Petition before it to be in order and directed an amendment the details of which we shall refer to later, while W.P. No. 532 of 1957 seeks the issue of a direction injuncting the Tribunal from further proceedings with the petition on the ground that the Election Petition not being in order the Tribunal ought to have dismissed it *in limine* because according to the petitioner, it was beyond its jurisdiction to retain it on its file and to proceed with it. Similarly W.P. Nos. 573 and 574 of 1957 are by the candidate who was returned as duly elected to the single member Salem I Constituency of the Madras Legislative Assembly. W.P. No. 573 of 1957 seeks the issue of a writ of *certiorari* to quash the order of the Tribunal which held the petition questioning his election, to be in order. W.P. No. 574 of 1957 seeks the issue of a writ of prohibition directing the Tribunal not to proceed further with the Election Petition.

It would be convenient to consider first the points raised in W.P. Nos. 573 and 574 of 1957 because all the points raised in them are common to both the sets of petitions.

W.P. Nos. 573 *and* 574 *of* 1957.—There was a general election to the Madras Legislative Assembly from the single member Salem I Constituency in January-March, 1957. As many as 10 persons filed their nominations as candidates for this election. The date fixed for the scrutiny of the nomination papers was 1st February, 1957 and the Returning Officer after an examination of the several papers held all the 10 nominations to be in order. He accordingly prepared a list of validly nominated candidates as required by section 36 (8) of the Representation of the People Act, 1951, as amended in 1956 (which we shall hereafter refer to as the Act) showing all these ten as candidates, whose nominations had been found valid, and affixed this list to his notice board. Under section 37 of the Act any candidate might withdraw his candidature before three o'clock in the afternoon of the day fixed for such withdrawal (the date thus fixed in the case of the election in the present case being 4th February, 1957). Five of the candidates withdrew their nominations under this provision, with the result that five candidates still remained to contest the election. The poll had been fixed for being taken on 6th March, 1957. Under the procedure which prevailed before the amendments introduced by the Representation of the People (Second Amendment) Act (XXVII of 1956), all these five who had not withdrawn their nominations would have gone to the polls. A change was however introduced by section 33 of the Amending Act XXVII of 1956 by which a new section 55-A was introduced into the main Act under which a provision was made for candidates withdrawing from the contest and not going to the polls by a formal notice of retirement given not later than 10 days prior to the date fixed for the polls. We shall have to deal with the effect of this provision in considerable detail later, but shall proceed with the narrative of what transpired subsequently and which has led to these Writ Petitions, before referring to the scope and effect of the provision for withdrawal. Out of the five candidates who remained after the withdrawals two retired before 23rd February, 1957, with the result that only three of the candidates who had been duly nominated went to the polls. The polling took place as stated before on 6th March, 1957. As a result of the counting of the votes recorded at the polls, the Returning Officer declared Sri Mariappan the petitioner before us as duly elected, he being taken to have received 24,920 votes as compared with Sri Nedunchezhiyan the first Respondent before us who secured 24,713 votes, the third candidate Sri Samuel getting only 5,487 votes.

Section 81 of the Act enacts that an Election Petition calling in question any election may be presented within 45 days from the date of election of the returned candidate by *inter alia* any candidate at such election. Sri Nedunchezhiyan submitted a petition to the Election Tribunal as required by section 81 (2) of the Act within the time limited. The petition was also accompanied by the deposit of Rs. 1,000 as security for costs required by section 117 of the Act. The petition was despatched by registered post on 15th April, 1957 and was received by the Election Commission on the next day. The parties impleaded as respondents to this petition were only two. It is not necessary to detail the charges made against the returned candidate or of the allegations on the basis of which the petitioner sought his relief but it is sufficient to say generally that the returned candidate was charged with having been guilty of corrupt practice. There were also allegations that there had been non-compliance with the provisions of the Act and the Rules made thereunder which materially affected the result of the election. But what is of importance having regard to the points raised in these Writ Petitions are the reliefs sought by the petitioner. This was contained in paragraph 22 of the petition and ran in these terms :

"The petitioner therefore prays that: (*a*) the election of the first respondent (Sri Marlappan) be declared void ; and

(*b*) The petitioner be declared duly elected to the Legislative Assembly of Madras State from Salem I Constituency.

(*c*) costs.

(*d*) and other reliefs.

This petition, which was received by the Election Commission, was numbered as Election Petition No. 74 of 1957 and was scrutinised by the Commission. It thereafter addressed a communication to the election-petitioner on 25th April, 1957 drawing his attention to the fact that the petition appeared to be not in order in that it did not comply with the requirements of section 82 of the Act because it had omitted to implead the two candidates who had retired from the contest under the provisions of section 55-A to which we have already referred. The Commission expressed its willingness to hear the election petitioner before any further orders were passed in the petition. The petitioner answered this by a communication, dated 2nd May, 1957, in which he elaborately argued the point as to whether these two candidates who had retired were necessary parties to the petition on the terms of section 82 and sought to make out that they were not, and asserted that the petition as filed was in order. He however added in paragraph 6 a statement that the defect if any by reason of the non-joinder was curable by necessary amendments to the petition which could be effected after the petition was referred to the Tribunal. In the alternative the petitioner urged that the petition would be in order at least in regard to his prayer for setting aside the election of the returned candidate, even if not in relation to the prayer seeking a declaration that he had been duly elected, and that he would if necessary confine his relief to that contained in prayer (*a*) of paragraph 22. The Election Commission did not record any decision as to whether the petition was in order or not, but referred the petition to the Election Tribunal under section 86 of the Act and the District Judge of Vellore was appointed as the Tribunal to deal with the petition.

When the Election Tribunal took up the Election Petition on its file, Sri Mariappan the returned candidate (the first Respondent in the Election Petition) filed before it I.A. No. 103 of 1957 praying that the Election Petition might be dismissed under section 90 (3) of the Act on the ground that the petition was not in order and did not comply with the statutory requirements for the reason that the two candidates who had retired under the provisions of section 55-A were not made respondents. The election petitioner filed a counter-affidavit and the Election Tribunal by its order, dated 13th July, 1957 dismissed the I.A. holding that the petition was in order. The legality and correctness of this order are challenged in W.P. No. 573 of 1957 which prays for the issue of a writ of *certiorari* to quash the order and W.P. No. 574 of 1957 seeks the issue of a writ of prohibition directing the Election Tribunal not to proceed further with the petition, the reason again

being the same, namely, that the petition as it stands is incompetent and that the Tribunal has no jurisdiction to proceed with it.

Two points require consideration for the disposal of these petitions: (*a*) Did the Election Petition filed by the first Respondent comply with the provisions of the Act and in particular with section 82 to whose terms we shall refer in an instant. If the answer to this were in favour of the first respondent no further question would arise for consideration. (*b*) If, on the other hand it was held that on a proper construction of the relevant provisions of the Act, the two retiring candidates should have been impleaded as parties, to the Election Petition and that the Election Petition was defective in not having done so, the question that would immediately arise would be the legal effect of this irregularity. The point that would then arise would be whether the Election Petition had necessarily to be dismissed or whether the Tribunal was vested with jurisdiction to permit an amendment of the petition so as to enable the election petittioner to rectify the defect and proceed further with the petition, either by impleading the omitted parties or by giving up the relief which necessitated their joinder. It would be seen from the above that the main question in controversy would be as to the proper construction of section 82 of the Act. But before referring to it we shall only add this by way of introduction. Article 329 of the Constitution provides :

329 : Notwithstanding anything in this Constitution—

(*a*) . . . .

(*b*) no election to either House of Parliament or to the House or either House of the Legislature of a State shall be called in question except by an Election Petition presented to such authority and in such manner as may be provided for by or under any law by the appropriate Legislature.

The "law made" in this regard is contained in the Representation of the People Act, 1951 as amended from time to time. Section 80 of the Act enacts :

"80. *Election petitions.*—No election shall be called in question except by an Election Petition presented in accordance with the provisions of this part" (the relevant part being Part VI headed 'Disputes Regarding Elections').

Section 81 specified the grounds upon which and the manner in which an Elction Petition is to be presented and the time within which this has to be done. Section 82 deals with the necessary parties to such a petition. This section as it stood prior to its amendment in 1956 ran :

"A petitioner shall join as respondents to his petition all the candidates who were duly nominated at the election other than himself if he was so nominated".

The last words of the section were due to the fact that under section 81 an Election Petition could be presented not merely by a candidate at the election but also by any elector. Section 82 underwent a modification by the Second Amendment Act of 1956 and it is the section as amended that governs the proceedings before us. After the amendment the section now reads :

"82. *Parties to the petition.*—A petitioner shall join as respondents to his petition—

(*a*) where the petitioner, in addition to claiming a declaration that the election of all or any of the returned candidates is void, claims a further declaration that he himself or any other candidate has been duly elected, all the contesting candidates other than the petitioner, and where no such further declaration is claimed, all the returned candidates ; and

(*b*) any other candidate against whom allegations of any corrupt practice are made in the petition."

As the parties to be impleaded to a petition are under section 82 (*a*) now linked up with the reliefs sought in it, it is necessary to advert to the provision dealing with these reliefs which an Election Petition may pray for and this is section 84. This section also underwent some changes in 1956 and it might be necessary to set out the section as it stood before referring to its present form.

BEFORE AMENDMENT.	AFTER AMENDMENT.
84. *Relief that may be claimed by the petitioner.*	84. *Relief that may be claimed by the petitioner :*
A petitioner may claim any one of the following declarations. (*a*) that the election of the returned candidate is void ; (*b*) that the election of the returned candidate is void and that he himself or any other candidate has been duly elected ; (*c*) that the election is wholly void.	A petitioner may, in addition to claiming a declaration that the election of all or any of the returned candidate is void, claim a further declaration that he himself or any other candidate has been duly elected.

It will be noticed that relief (*c*) in section 84 as it originally stood has now been deleted and that the two reliefs indicated by (*a*) and (*b*) of the then section, are those which might now be claimed and that though the language of the section is now slightly different it introduces no substantial change.

Section 85 of the Act enacts :

85. *Procedure on receiving petition.*—If the provisions of section 91 or section 82 or section 117 have not been complied with, the Election Commission shall dismiss the petition :

Provided that the petition shall not be dismissed without giving the petitioner an opportunity of being heard.

The only other provision to which it is necessary to refer at this stage is section 90 (3) which runs :

"The Tribunal shall dismiss an Election Petition which does not comply with the provisions of section 81, section 82 or section 117 notwithstanding that it has not been dismissed by the Election Commission under section 85".

The points that arise on these provisions may be briefly stated thus. The election petitioner sought the two reliefs open to him under section 84, namely, a declaration that the election of the returned candidate was void and also a further and additional declaration that he himself had been duly elected. If the only relief prayed for in the Election Petition was a declaration that the election of the returned candidate was void, the only party who had to be joined as respondent to the Election Petition would be the returned candidates, subject to the addition of other candidates under section 82 (*b*) if charges of corrupt practice had been made against them. Where however an election petitioner claimed in addition, the further relief set out in the last portion of section 84, namely a declaration that he himself was duly elected section 82 (*a*) requires the impleading of all "the contesting candidates" as respondents. Up to this stage there is no dispute, but the point in controversy is as to whether a candidate who has retired from the contest under section 55-A is a contesting candidate" within section 82 (*a*). If a candidate who has retired is not held to be "a contesting candidate" the petition with which we are concerned was filed regularly and would have complied with the requirements of sections 81, 82 and 117 and could be tried and disposed of by the Election Tribunal in accordance with law. If, on the other hand, the answer to it were in the affirmative, the Election Petition No. 74 of 1957 filed by the first Respondent before us would not have complied with the provisions of section 82 and would have attracted the terms of section 85 and section 90 (3) of the Act. Further questions would arise as to the duty and powers of the Tribunal in dealing with petitions irregularly constituted and as to whether the Tribunal was bound to dismiss them *in limine* or whether it had power to permit amendments so as to bring them into conformity with the provisions of the Act.

We shall therefore first address ourselves to the question as to whether a candidate who had retired under section 55-A was "a contesting candidate" within section 82 (*a*). Before doing so however, it is necessary to advert to the position as it stood under the Act before the amendments effected in 1956.

Under section 36 of the Act as it originally stood the Returning Officer was directed to endorse on each nomination paper his decision accepting or rejecting

the same and in cases where the nomination paper was rejected, to record in writing, a brief statement of his reasons therefor. After this scrutiny, the candidates, whose names survived the scrutiny, were under section 37 permitted to wtihdraw their candidature before the end of the third day after the date-of the scrutiny. Section 38 as it originally stood in 1951 eancted :

> " The Returning Officer shall immediately after the expiry of the period within which candidatures may be withdrawn under sub-section (1) of section 37 prepare and publish a list of valid nominations in such manner as may be prescribed."

Section 82 as it then stood enacted :—We shall repeat the words we have already set out—

> " A petitioner shall join as respondents to his petition all the candidates who were duly nominated at the election other than himself if he was so nominated."

The question which was debated before the Election Tribunals and the Courts under section 82 as it then stood was as to whether candidates who had withdrawn from the filed under section 37 (1) after their nomination papers had after scrutiny been found to be valid, were " duly nominated candidates at the election " who had to be impleaded so as to satisfy the requirements of section 82. The Election Tribunals held divided views on this matter and there was also conflict of opinion between the Bombay and the Allahabad High Courts on the one hand (See *Sitaram* v. *Yograj Singh*[1] ; *Sheo Kumar* v. *V. G. Oak*[2] ; and the Patna High Court on the other, *S. M. Umair* v. *R. C. Singh*[3]. The view which found favour with the learned Judges of the Bombay and the Allahabad High Courts was that candidates who had withdrawn, could not be held to be " duly nominated candidates *at the election* " the emphasis being on the aspect that though they were duly nominated,—because at the scrutiny, their nomination papers were accepted,—they were not *candidates at the election* since they abstained from going to the polls. On the other hand, the learned Judges of the Patna High Court held that the words " at the election " could not be read as synonymous with " at the polls " and that as even the withdrawing candidates had participated in the nomination and upto the stage of scrutiny which were all stages in an election, they should be deemed to be " *candidates at the election* " and therefore were necessary parties to an election petition. The correctness of these two conflicting views was raised before the Supreme Court in *Bhikoji Keshao Joshi* v. *Bijlal Nandlal Biyani*[4]. But the Supreme Court after noting the difference in the views and the reasons on which each was based decided the appeal before it on a different point leaving the question open.

The amendments effected in 1956 were possibly designed to end this controversy and to lay down without ambiguity the persons who had to be impleaded. But it would be seen that though the difficulties caused by the use of the words " at an election " were overcome by dropping these words a new one was introduced by the use of the expression " contesting candidates ". The first place where the expression " contesting candidates " occurs in the Act is in section 38 as amended. In place of section 38 which has been extracted earlier the section was amended to read :

> " 38.—*Publication of list of contesting candidates.*—(1) Immediately after the expiry of the period within which candidatures may be withdrawn under sub-section (1) of section 37, the Returning Officer shall prepare and publish in such form and manner as may be prescribed a list of contesting candidates, that is to say, candidates who were included in the list of validly nominated candidates and who have not withdrawn their candidature within the said period.
>
> (2) The said list shall contain the names in alphabetical order and the addresses of the contesting candidates as given in the nomination paper together with such other particulars as may be prescribed."

If there were nothing more in the Act than what was contained in section 38, the expression " contesting candidate " occurring in section 82 must necessarily be held to include every candidate whose name was included in the list prepared under section 38 (1). But the matter is complicated by reason of the provision for

1. I.L.R. (1953) Bom. 865 : A.I.R. 1953 Bom. 293.
2. A.I.R. 1953 All. 633.
3. I.L.R. 32 Pat. 956: A.I.R. 1954 Pat. 225.
4. (1955) 2 S.C.R. 428.

withdrawal contained in section 55-A which was introduced by section 33 of Act XXVII of 1956. As the entire argument on both sides turned on the proper construction of the several provisions contained in section 55-A we consider it necessary to set out the section in full before proceeding further.

" 55-A.—*Retirement from contest at elections in Parliamentary and Assembly constituencies*:

(1) The provisions of this section shall apply in relation to any election in a Parliamentary or Assembly constituency.

(2) A contesting candidate may retire from the contest by a notice in the prescribed form which shall be delivered to the Returning Officer between the hours of eleven o'clock in the forenoon and three o'clock in the afternoon of any day not later than ten days prior to the date or the first of the dates fixed for the poll under clause (*d*) of section 30 either by such candidate in person or by an agent authorised in this behalf in writing by such candidate.

(3) No person who has given a notice of retirement under sub-section (2) shall be allowed to cancel the notice.

(4) The Returning Officer shall, upon receiving a notice of retirement under sub-section (2), cause a copy thereof to be affixed to his notice board and also to be published in such manner as may be prescribed.

(5) Any person who has given a notice of retirement under sub-section (2) shall thereafter be deemed not to be a contesting candidate for the purposes of section 52.

(6) Where by reason of any retirement from the contest under the section, the number of remaining contesting candidates becomes equal to the number of seats to be filled, the Returning Officer shall forthwith declare all such candidates to be duly elected to fill those posts and countermand the poll.

(7) Where by reason of any retirement from the contest at an election to which the provisions of section 54 apply, the number of remaining contesting candidates qualified to be chosen to fill the reserved seats becomes equal to the number of such seats, the Returning Officer shall forthwith declare all those candidates to be duly elected to fill those seats and countermand the poll in so far as it relates to elections for filling those seats and the procedure laid down in section 53 shall be follwed for filling the remaining seat or seats if any ".

It will be seen that sub-section (5) makes a reference to section 52 which deals with the effect of the death of a candidate before the poll and to which we shall advert a little later.

The learned Judge of the Election Tribunal has held that a candidate who has retired from the contest under the provisions of section 55-A (2) ceased to be a " contesting candidate " from the date of his retirement and that consequently he could not be held to be a " contesting candidate " within the meaning of section 82 (*a*) of the Act.

The learned Advocate-General who appeared on behalf of the petitioner strongly criticised the reasoning of the Tribunal on the basis of which this interpretation was rested and we therefore consider it proper that we should re-examine the entire provisions in the light of the arguments addressed to us.

The steps in the argument of the learned Advocate-General were as follows : Section 38, though not in so many terms, constitutes in effect a definition of the expression "contesting candidate". The use therein of the words "that is to say " lends support to this construction, namely that by " contesting candidate " the Act meant every candidate whose name was included in the list of validly nominated candidates and who had not withdrawn his candidature within the time allowed by section 37 (1). The next question is whether the terms of section 55-A which made provision for the retirement of a candidate affected any change by way of rendering a " retired candidate " a person other than " a contesting candidate ". His answer was somewhat on these lines. Section 55-A (2) no doubt speaks of a " contesting candidate " retiring from the contest by notice in writing, and for the notice of retirement which is irrevocable, being published by affixture to the notice board and also in the Official Gazette, the latter being the result of a prescription under sub-section (4). If section 55-A contained no further provision, it might have been possible to hold that a person who was a " contesting candidate " at the stage of section 38 ceased to occupy that character or to answer that description, when he retired, because of the use of the expression " retiring from the *contest* " in section 55-A (2). But that section does not stop there. It

goes on to make a specific provision in sub-section (5) where the statute not merely prescribes but also limits the effect of a retirement under sub-section (2). Sub-section (5) runs :

" Any person who has given a notice of retirement under sub-section (2) shall thereafter be deemed not to be a contesting candidate for the purpose of section 52."

The contention of the learned Advocate-General was that this provision had two-fold effect. (1) An implication that but for this specific provision a retiring candidate would be "a contesting candidate" and (2) this implication being avoided for the purpose of section 52 alone, in other words, in the absence of such a provision, even for section 52 a retiring candidate would be a contesting candidate, and that this consequence was avoided by the specific provision in that behalf, and that except for this limited purpose, a retiring candidate was " a contesting candidate ".

It would be seen that this argument involves two steps, which may not each be necessarily dependent on the other. The first is that but for sub-section (5) a retiring candidate would have been comprehended within the expression of a " contesting candidate " in section 52 and the second that by reason of the fiction involved in the expression " deemed " the statute conceived of a candidate, who had retired, as being still a " contesting candidate ", notwithstanding *his retirement from the contest*, except for the purposes of section 52.

We shall now proceed to consider the argument we have set out above in regard to both these aspects. The first is whether the absence of such a provision as is contained in sub-section (5) would have made any difference to the scope and effect of section 52. The Election Tribunal has in this connection held that in relation to section 52, sub-section (5) of section 55-A should be deemed to have been enacted only *ex abundanti cautela* and that even without such a specific provision section 52 would have been construed in the same manner.

Section 52 as it originally stood before its amendment in 1956 ran as follows :

" *Death of candidate before poll.*—If a candidate who has been duly nominated under this Act dies after the date fixed for the scrutiny of nominations and a report of his death is received by the Returning Officer before the commencement of the poll, the Returning Officer shall, upon being satisfied of the fact of the death of the candidate, countermand the poll and report the fact to the Election Commission and also to the appropriate authority and all proceedings with reference to the election shall be commenced anew in all respects as if for a new election.

Provided that no further nomination shall be necessary in the case of a candidate whose nomination was valid at the time of the countermanding of the poll :

Provided further that no person who has under sub-section (1) of section 37 given a notice of withdrawal of his candidature before the countermanding of the poll shall be ineligible for being nominated as a candidate for the election after such countermanding ".

The section as amended runs :

" 52. *Death of candidate before poll.*—If a contesting candidate dies and a report of his death is received before the commencement of the poll, the Returning Officer................

shall, upon being satisfied of the fact of the death of the candidate, countermand the poll and report the fact to the Election Commission and also to the appropriate authority and all proceedings with reference to the election shall be commenced anew in all respects as if for a new election.

Provided that no further nomination shall be necessary in the case of a person who was a contesting candidate at the time of the countermanding of the poll.

Provided further that no person who has given a notice of withdrawal of his candidature under sub-section (1) of section 37 or notice of retirement from the contest under sub-section (2) of section 55-A before the countermanding of the poll shall be ineligible for being nominated as a candidate for the election after such countermanding "

We shall now proceed to examine the exact changes which section 52 has undergone. (1) The opening words of the section : "If a candidate who has been duly nominated under this Act dies after the date fixed for the scrutiny of nominations and a report of his death is received by the Returning Officer" are replaced by " if a contesting candidate dies and a report of his death is received before the commencement of the poll the Returning Officer shall....."

(2) in the first proviso for the words "in the case of a candidate whose nomination was valid" are substituted the words "in the case of a person who was a contesting candidate". (3) In the second proviso after the reference to the withdrawal under section 37 (1) the words "or a notice of retirement from the contest under sub-section (2) of section 55-A" have been added in the section as amended. It will be seen that the first two changes consist in the replacement of the expression "candidate duly nominated" by "contesting candidate" the last one being the reference to the newly enacted section 55-A (2).

We shall first consider what the effect would have been, if section 55-A (5) were not there, on the meaning of the expression "contesting candidate" in section 52. We have already set out the terms of section 55-A (2) where the words used are "retire from the contest" and we have already adverted to the fact, that it was not seriously in dispute, that if section 55-A (5) were not there, the effect of a retirement under section 55-A (2) would have been to remove the person who retired from the contest from the category of "contesting candidates". If this were so, in the first paragraph of the present section 52 the words "contesting candidate" would naturally be understood as meaning "a contesting candidate who had not retired from contest under section 55-A (2)". There is no doubt that the two provisos to section 52 appear to point to different constructions in their connotation of the expression "contesting candidate". The first proviso indicates that a contesting candidate need not file any fresh nomination. If the expression "contesting candidates" here, were read as excluding a retired candidate, there seems to be no necessity for the specific provision in the second proviso by which a person who had retired under section 55-A (2) is made eligible to file a fresh nomination, implying thereby that the nomination he originally filed before his retirement would not suffice as a valid nomination for the fresh poll which might take place under the first paragraph of the section. This, however, appears to us not seriously to detract from the conclusion which we are inclined to draw, that even in the absence of section 55-A (5) the expression "contesting candidate" used in section 52 would mean a candidate who had not retired from the contest under section 55-A (2).

The next point to be considered is as regards the second limb of the argument of the learned Advocate-General, that section 55-A (5) by implication indicated that except for the purposes of section 52, a retirement from the contest did not impair a candidate's status or affect his statutory description, as a "contesting candidate".

We have carefully considered the submissions made to us both by the learned Advocate-General in these petitions as well as Mr. Nambiar who argued the other Writ Petitions, Nos. 531 and 532 of 1957, and we are of the opinion that the Tribunal was right in the view that it took, namely that section 55-A (5) had not the effect contended for on behalf of the petitioners before us. In arriving at this conclusion we have been greatly impressed by the terms of section 55-A (2) which refers to "the retirement *from the contest*" and to the manner in which sub-section (5) itself is worded. The sub-section does not positively create or indicate a fiction. It is expressed in the negative and states that a person who has retired shall not be deemed to be a contesting candidate though it might for the purpose of section 52. No doubt the "deeming" is only for the purpose of section 52. But from this last feature we find it not possible or reasonable to draw the inference that the section contains a positive provision that for all purposes other than that of section 52 the person who has given a notice of retirement shall be or shall be deemed to be a "contesting candidate". In our judgment, if the counsel for the petitioner is not able to establish this last step, the argument must fail for lack of sufficient words in the section to sustain such a contention.

We shall next proceed to consider whether apart from the argument based on the "deeming" provision in section 55-A (5) there is basis for the contention that under section 82 (*a*), a retired candidate is "a contesting candidate" within section 82 (*a*). Section 82 occurs in Part VI of the Act, and the Part opens with

section 79 containing the definition of the terms used in that part and the two succeedings ones. Among the terms here defined is the word " candidate " which is in these terms :

> " (b) ' candidate ' means a person who has been or claims to have been duly nominated as a candidate at any election, and any such person shall be deemed to have been a candidate as from the time when, with the election in prospect, he began to hold himself out as a prospective candidate ".

Learned Counsel for the respondent faintly suggested—and this was one of the points which was implicit in his argument—that the expression " contesting candidate " in section 82 should be read as a compound made up of two words " contesting " and " candidate " the latter being understood as defined in section 79 (b). The argument was : "Read the word 'candidate' as defined in section 79 (b). Qualify and restrict it with reference to the expression 'contesting' and then you reach the position that "a candidate" who *contests* is a contesting candidate". So understood you have to find out whether the person in question did " contest " in the election or not, and " election " being understood in the sense of the poll, a " contesting candidate " within section 82 would be one who was " a candidate " as defined in section 79 (b) and who continued the contest until the poll ". This is somewhat similar to the reasoning of the Tribunal by which it arrived at the conclusion, that a candidate who has retired ceased to be a contesting candidate within section 82. The Tribunal stated that in the absence of a statutory definition it was " the popular " or " the grammatical " meaning that had to be attributed to the words " contesting candidate ", and so understanding them, it held that a candidate, who did not *continue the contest* until the end of the poll would not popularly be understood as " a contesting candidate " and was not therefore " a contesting candidate " within section 82. The learned Advocate-General disputed the correctness of this reasoning in a forceful argument, and in our opinion justifiably. The expression " contesting candidate " is not a popular one, having any definite meaning. We do not think that it will be permissible to split this expression into its two components and read the two as if the combination was used in section 82 (a) without reference to the expression as found elsewhere in the enactment.

The learned Advocate-General submitted a different approach as the proper one to be adopted for arriving at the meaning of these words. This was a variant of the one we have already referred to. This consisted in treating the expression as having been defined in section 38 (1) of the Act. Section 38 (1) was, as we have already pointed out, the first place where the expression occured and it was urged that the use of the expression " that is to say " was some if not a sure indication that section 38 (1) should be read as a provision defining the term. If this were a definition—and it is found that section 82 uses the same expression—then the normal rule of construction would be to understand it as contained in the definition. This method of construction he admitted has however to be applied with reference to the provision in section 55-A (2) which allowed a candidate to retire from the contest. If section 55-A (2) stood alone it might have the effect of modifying the content of the expression " contesting candidate " in section 38 so as to render a retiring candidate one who was not a contesting candidate. But the effect of section 55-A (2) was not absolute or unconditional. It was controlled and its operation restricted by the provisions in section 55-A (5), which in terms extended the effect of section 55-A (2) only to section 52. The result of this restriction on the operation of section 55-A (2) would naturally and necessarily be that in other cases the definition in section 38 would prevail.

We are unable to accept this argument either. In the first place we find some difficulty in treating section 38 (1) as in truth and effect a definition section. The scheme of the Act as disclosed by its provisions shows that definition clauses have been expressly introduced. Section 2 is in terms the interpretation section, and the definitions contained in it have effect " throughout the Act, unless the context otherwise required ". The Act also contains other definitions which have application to particular Chapters or particular sections or sub-sections. For instance section 9 which occurs in Chapter III of Part II contains definitions whose effect

is confined to that Chapter. We have already referred to section 79 which contains a definition applicable to the use of expressions in Parts VI, VII and VIII. Section 123 (5) contains an explanation defining the term " vehicle " for the purpose of that, sub-section. There is a similar explanation of the expression " agent " occurring after section 123 (7), the scope of the definition however extending to the entire section and not to the sub-section, as in the *Explanation* to section 123 (5). Similar provisions occur throughout the Act, and without being exhaustive we shall content ourselves by a reference to section 168 which contains a definition applicable to that section only.

The learned Advocate-General however submitted that if section 38 should be treated as defining the expression " contesting candidate ", there was no restriction of that definition to any particular sub-section, section or Chapter as in the instances we have set out and that consequently the definition ought to be read as applicable to and as connoting the meaning of the expression wherever it occurred in the Act, unless the context indicated anything to the contrary.

It would be seen from the various provisions of the enactment to which we have referred that whenever the framers of the Act considered that they were defining an expression they said so in express terms and also made clear the scope and operation of the definition they introduced. If this were the basic scheme of the enactment, we find it difficult to treat section 38 as including also a definition of the words " contesting candidate ". On the other hand, the submission made on behalf of the respondents, that section 38 had to be read as merely laying down the duties of a Returning Officer at the stage at which that section occurs and as setting out the contents of a list which he had then to prepare appears to us to be the more reasonable construction to adopt as to the scope of that section. Of course when the expression " contesting candidate " is used subsequently, it has to be read in conjunction with and as modified by the provision as to retirement newly introduced in section 55-A by the amendment effected in 1956. So understood it would mean that if the provision in question where the expression " contesting candidate " occurs related to a point of time after the retirement it would exclude a retired candidate but if it related to a period anterior to that date, it would mean any candidate whose name was included in the list published under section 38.

This leads us on to an examination of the several provisions in which the expression " contesting candidate " occurs in the Act as amended. The sections in which this expression occurs are sections 46, 47, 52, 53, 54, 55-A, 78 and 82. We shall now scrutinise these sections with a view to see whether they lead to the inference that when the expression " contesting candidate " occurs it must necessarily be taken to include a candidate who has retired, in other words, whether on the scheme of the Act the name in the list of the persons shown as " contesting candidates " prepared under section 38 (1) is adhered to as the criterion for understanding the relevant expression.

Section 46 enables " a contensting candidate or his election agent to appoint " in the prescribed manner " agents " and " relief agents " to act as " polling agents ". Section 27 of the amending Act substituted the new section 46 for the old section 46 in the Act as enacted in 1951. Originally section 46 opened with the words :

> " A candidate who has been duly nominated under this Act and who has not withdrawn his candidature in the manner and within the time specified in sub-section (1) of section 37."

This section has been replaced by one which runs :

> " 46. *Appointment of polling agents.*—A contesting candidate or his election agent may appoint in the prescribed manner such number of agents and relief agents as may be prescribed to act as polling agents of such candidate at each polling station provided under section 25 or at the place fixed under sub-section (1) of section 29 for the poll ".

Rule 13 of the Representation of the People (Conduct of Election and Election Petitions) Rules, 1956, contains the prescription referred to in section 46. It runs :

> " 13. *Appointment of polling agents.*—(1) The number of polling agents that may be appointed under section 46 shall be one agent and two relief agents.

(2) Every such appointment shall be made in Form 10 and shall be made over to the polling agent for production at the polling station or the place fixed for the poll, as the case may be.

(3) No polling agent shall be admitted into the polling station or the place fixed for the poll unless he has delivered to the Presiding Officer the instrument of his appointment under sub-rule (2) after duly completing and signing before the Presiding Officer the declaration contained therein.

Rule 13 by its terms or its text does not, it would be seen, throw any light on the question now under consideration, namely whether a polling agent could or could not be appointed by a person who had retired from the contest under section 55-A (2). But some indication is gatherable as regards the intention of the rule-making authority by the exact place where this provision for the appointment of polling agents occurs among the rules. Rule 16 prescribes the form of the notice of retirement to be given by a candidate and the manner in which that notice has to be published in addition to its being notified on the notice board of the Returning Officer. The fact that the prescription as to the notice of retirement occurs after the rule relevant to the appointment of polling agents might be some indication that polling agents might be appointed by candidates before their retirement.

The effect of the retirement of a candidate on the functions of a polling agent appointed by him is however to be found in rule 22 which prescribes the persons who were entitled to be admitted into a polling station. This rule 22 (1) (*b*) provides for the admission *inter alia* :

" of every candidate, his election agent, and subject to the provisions of sub-rule (3) of rule 13, one polling agent of each candidate ".

The expression " candidate " used in this rule is however to be read in conjunction with the definition in rule 17 with which the chapter in which rule 21 occurs, opens. A " candidate " is defined there as :

" 'candidate' means a contesting candidate who has not retired in accordance with the provisions of section 55-A ".

We might at this stage note in passing that under rule 20 at each polling station a list of contesting candidates is required to be displayed and the contents of this list are specified in rule 20 (1) (*b*) in the following terms :

" 20 (1) (*b*): a copy of the list of contesting candidates in Form 7-A (that is the list prepared under section 38 (1)) with such correcttions, if any, as may be necessary by reason of any candidate or candidates having retired from the contest under section 55-A."

Under rule 21 ballot boxes are provided one for each candidate and " candidate " here means by reason of the definition in rule 17 (*b*) " a contesting candidate who has not retired ". If rule 22 were read in conjunction with the definition in rule 17 (*b*) and the other provisions we have referred to above, a polling agent of a candidate who has retired would not be entitled to admission into a polling station. This would throw some light upon the question we are now considering and indicate that " a contesting candidate ", who could under the terms of section 46 appoint a polling agent who could function as such, is confined to that candidate who had not retired. In the case of candidates who had retired, though section 46 might not lay an embargo on their appointing such agents, the latter cannot function as such at the poll by reason of rule 22.

The next section to be considered is section 47 the material part of which runs:

" 47. *Appointment of counting agents.*—A contesting candidate or his election agent may appoint in the prescribed manner one or more persons but not exceeding such number as may be prescribed, to be present as his counting agent or agents at the counting of votes and when any such appointment is made notice of the appointment shall be given in the prescribed manner to the Returning Officer."

The submission of the learned Advocate-General on the use of the expression " contesting candidates " in section 46 as well as in this section was that they threw no light on the problem now under examination, as these two sections were facultative and not mandatory and that they merely empowered the contesting candidates to do particular acts, which it is their option to do or not, and that in cases where a candidate had retired, he would not exercise the option given in this section, because there was no need for him to do so. We however consider that this is

not a proper approach to the question and that these provisions do throw some light on the mind of the draftsman who used the expression "contesting candidates" in the various sections which we have referred to.

Taking section 47, the prescription referred to in it is under Part II, Chapter III of the Rules. The persons who might be appointed as counting agents and the number of counting agents who could be so appointed are set out in rule 54. That rule runs :

> "(1) The number of counting agents that a candidate may appoint under section 47 shall . . . . . not exceed twelve at the place or each of the places fixed for counting under rule 53".

"Candidate" is for the purpose of this rule and the other rules occurring in Chapter III defined in rule 52 (*b*) as "a contesting candidate" who has not retired in accordance with the provisions of section 55-A. This is in the same terms as in rule 17 to which we have adverted. The result therefore is that under the rules, a candidate who may appoint a counting agent is one who falls within the definition in rule 52 (*b*). In other words, this excludes candidates who had retired under section 55-A from the right to appoint a counting agent under section 47. If, therefore, the terms of section 47 and the prescription under the rules have to be reconciled, it should be held that the "contesting candidates" who could validly appoint counting agents within section 47 do not include candidates who have retired under section 55-A (2). In line with rule 22 dealing with admission to polling stations we have rule 55 dealing with admission to places fixed for counting, and the Returning Officer is permitted by this rule to exclude from the places so fixed all persons except *inter alia* every "candidate" and "his agents". Rule 55 (*a*) occurs in Chapter III, Part II and the expression "candidate and his agents" has therefore to be understood in the light of the definition contained in rule 52 (*b*) which excludes the retiring candidate from the definition of candidates for the purpose of that chapter. We feel therefore justified in holding that the expression "contesting candidate" in section 47 has to be understood as not including a retired candidate.

We have already discussed the terms of section 52 and we shall therefore proceed to consider the meaning of that expression in section 53. The material part of that section runs :

> "(1) If the number of contesting candidates is more than the number of seats to be filled, a poll shall be taken.
>
> (2) If the number of such candidates is equal to the number of seats to be filled, the Returning Officer shall forthwith declare all such candidates to be duly elected to fill those seats.
>
> (3) If the number of such candidates is less than the number of seats to be filled, the Returning Officer shall forthwith declare all such candidates to be elected........"

In the context of the other provisions of the enactment, the stage when the provisions of the section could come into play is when the list of contesting candidates is published under section 38. Under section 30 the notification by the Election Commission regarding the holding of election has to specify the

* * * * *

> (*d*) the date or dates on which a poll shall, if necessary, be taken which or the first of which shall be a date not earlier than the twentieth day after the last date for the withdrawal of candidatures ;"

The list of contesting candidates prepared under section 38 contains the names of those candidates whose nomination papers have been accepted after scrutiny under section 36 and who had not availed themselves of the option to withdraw their nominations under section 37. If, at that stage, the number of contesting candidates is equal to or less than the number of seats to be filled, naturally no poll takes place, and it is only if the number of contesting candidates is more than the number of seats to be filled up, that there is necessity for a poll, and this is exactly the provision in section 53. It might be that by reason of retirement the number of candidates who survive to contest, in the sense of going to the polls, are less than the number of seats to be filled. Parliament provided for this contingency by section 55-A (6) which enacts :

> "Where by reason of any retirement from the contest under this section, the number of remaining contesting candidates becomes equal to the number of seats to be filled the Returning Officer shall forthwith declare all such candidates to be duly elected to fill those seats and countermand the poll.

In our opinion section 53 does not assist the learned Advocate-General in his construction as to the meaning of the expression "contesting candidate".

Section 54 which is the next section in which the expression occurs does not need separate discussion, because its provisions are analogous to section 53 and the contingencies provided for by section 55-A (6) in the cases to which section 53 applies are governed by section 55-A (7) in relation to the constituencies dealt with by section 54 and the two provisions are exactly parallel.

We have discussed the effect of the several sub-sections of section 55-A in full and we shall therefore pass on to section 78 which requires "every contesting candidate at an election" to lodge his account of election expenses with the Returning Officer within the period named in the section. There was considerable argument before us as to the import of the expression "contesting candidate" in the section. Section 78 is preceded by section 77 which requires *every candidate at an election* to keep accounts of the expenses incurred by him in the election. The words "candidate at an election" are wider than "contesting candidate at an election". It was submitted to us that Parliament would not have intended that a person who had retired from the contest under section 55-A (2) was not bound to lodge his return of election expenses and that this section was an indication that the person who had retired was a "contesting candidate". We are loathe to decide the proper construction of these words in section 78 when the question is not directly before us. One thing is clear, that the expression is susceptible of either construction contended for by the two sides and it cannot be asserted that on the mere language used, the words must mean to include a candidate who had retired. When the question really requires a decision, the Court would have to take into account not merely the expression "contesting candidate" but also the further words which follow it, namely "at an election" in the light of the views propounded on the meaning of these words, which occurred in section 82 as it originally stood by the Bombay and the Allahabad High Courts on the one hand and the Patna High Court on the other and also on the implications arising out of the nature of the obligation imposed on candidates under the provision. Further that rule 132 dealing with the notices to be given by a Returning Officer of the lodging of accounts of election expenses uses the word 'candidate' as if that were synonymous with a contesting candidate at an election might also have to be taken into account. But as we said earlier that question is not before us and we shall therefore content ourselves by saying that section 78 as yet furnishes no conclusive indication to determine the problem which we are now investigating.

We have next to consider the meaning to be attributed to the expression "contesting candidate" in section 82. The choice, it would be seen, is between the names to be found in the list prepared by the Returning Officer under section 38 (1) and that list as corrected with reference to candidates retiring under section 55-A (2) as referred to in rule 20 (1) (*b*). We are of the opinion that it is the corrected list of the "contesting candidates" referred to in the rule quoted above that is indicated by the expression "contesting candidate" in section 82. In the first place section 82 occurs at a stage long after the retirement and after the poll. As we have already seen the general scheme of the enactment read in the light of the rules appears to be to use the expression "contesting candidate" as meaning those in the list under section 38 (1) upto the stage of the withdrawal and as exclusive of the retired candidates from and after the stage of retirement. Nor is there any reason why Parliament should have intended to insist upon the impleading of candidates who had retired as parties to an election petition. After all one has to remember that "retirement" is in effect, a delayed withdrawal of nomination, and it is difficult to discern any reason why persons who had formally abandoned the contest should be made parties to the petition. Of course, if the words of the provision were clear and pointed to the necessity for such impleading, it would not be for the Court to examine whether there was reason behind the provision or not. But if the words used are, to put it at the highest, ambiguous, it appears to us to be a sound rule of construction to examine whether any purpose could be said to be served by the impleading of such parties, before accepting the contention

that the failure to implead them, rendered the petition defective as not being in compliance with the provisions of section 82 and thereby rendering it liable to be rejected under section 85 or section 90 (3). We have recorded earlier that despite the absence of a statutory definition, the expression " contesting candidate " cannot be given a " popular meaning." We have also examined the scope of the explanation of that expression in section 38. If it has to be viewed as a term of art, in the sense that the ordinary dictionary meaning will not always apply, the phrase " contesting candidate " will have to be construed with reference to the context in which the Act uses that expression, principally with reference to the stage to which the section in question applies. The stage for which section 82 provides precludes in our opinion the inclusion of a candidate who has retired from the contest within the scope of the expression " contesting candidate " as it occurs in it. Applying these tests we have arrived at the conclusion that a person who had withdrawn from the contest under section 55-A (2) is not a " contesting candidate " within section 82.

In this view it becomes unnecessary to consider the argument addressed to us by the learned Advocate-General as to the duty of the Tribunal, if the petition were defective in that it did not comply with the terms of section 82. We express no opinion on the question whether the amendments effected to section 85 and the language now employed in section 90 (3) effect any change in the law from what it stood prior to Act XXVII of 1956.

The result is that the decision of the Tribunal that the election petition was in compliance with the provisions of section 82 of the Representation of the People Act is correct and these petitions fail and are dismissed. There will be no order as to costs.

W.P. Nos. 531 *and* 532 *of* 1957 :—These two petitions, which are for the issue of writs of *certiorari* or prohibition in the alternative, arise out of an election petition in relation to an election to the Madras Legislative Assembly from the Sattur Constituency in the district of Ramanathapuram. This is a single member Constituency and 29th January, 1957, was fixed under section 30 (*a*) of the Representation of the People Act for the filing of nominations. Seven candidates duly filed their nominations. The date fixed for scrutiny under section 30 (*b*) was 1st February, 1957 and the Returning Officer found all the nominations to be in order. 4th February, 1957, was fixed under section 30 (*c*) as the last date for the withdrawal of the candidates. Four of the candidates withdrew before the dates specified with the result that there were only three remaining and the names of these three were published by the Returning Officer under section 38 (1). These three were: (1) the petitioner before us, (2) one Sri Jayarama Reddiar and (3) Sri Sundararaja Pillai. Sri Sundararaja Pillai withdrew from the contest by notice duly given and published under section 55-A (2) with the result that the candidates who went to the polls were the present petitioner and Sri Jayarama Reddiar. The poll was on 4th March, 1957 and at it the petitioner secured 36,400 votes and Sri Jayarama Reddiar 31,683 votes. The Returning Officer thereupon declared the present petitioner as duly elected to the Madras State Assembly.

Within the time limited by section 81, an elector in this constituency Kunju Thevar presented a petition to the Election Commission calling in question the election of the present petitioner. This was numbered as Election Petition No. 147 of 1957 by the Election Commission. The petition was forwarded on 18th April, 1957 and reached the Commission on 20th April, 1957. In compliance with section 117 of the Act, Kunju Thevar paid a sum of Rs. 1,000 as security for costs into the Sub-Treasury at Madurai and enclosed a chalan receipt along with the petition.

It might be convenient at this stage to refer to the two irregularities in the frame of the election petition and its presentation which was the subject of argument before us. In the petition as presented to the Election Commission Kunju Thevar had prayed for two reliefs which are thus set out in the concluding paragraph of the petition:

" It is therefore prayed that this Honourable Court may be pleased to declare the election of the first respondent (Petitioner here) from the Sattur Constituency as void and further it also

prayed that this Honourable Court may be pleased to declare the second respondent (Jayarama Reddiar) as a duly elected candidate in the election with the costs of petitioner and render justice".

The parties impleaded as respondents to this petition were only two, namely the present petitioner and Sri Jayarama Reddiar. Sundaraja Pillai the candidate who withdrew from the contest was not impleaded as a party. This was one item of irregularity,—a non-compliance with the provisions of section 82 (*a*) as regards the impleading of parties. The other irregularity related to the authority to whose credit the amount of Rs. 1,000 was deposited into the Sub-Treasury at Madurai. Section 117 of the Act enacts :

" 117. *Deposit of Security.*—The petitioner shall enclose with the petition a Government Treasury receipt showing that a deposit of one thousand rupees has been made by him either in a Government Treasury or in the Reserve Bank of India in favour of the Secretary to the Election Commission as security for the costs of the petition."

Kunju Thevar made the deposit in the Sub-Treasury of the sum of Rs. 1,000 named in the section as security for the costs of the election petition but in the column relating to the particular head of account towards which the deposit was made, it was not stated that it was in favour of the Secretary to the Election Commission but generally as security for costs of election petition.

When the petition was received in this form by the Election Commission, it required Kunju Thevar to show cause why the petition should not be rejected for the reason that a necessary party, namely, Sundararaja Pillai had not been impleaded as a party to the petition. Kunju Thevar replied by a memorandum asserting that his petition as filed was in order. As we shall be adverting to the terms of this memorandum a little later, we are not setting out its contents here. The Election Commission after noting the defect as regards the absence of the name of the Secretary in the receipt enclosed with the election petition, decided not to dismiss the petition under section 85 for reason, which it is not necessary to canvass, and referred the petition for enquiry to the Election Tribunal under section 86, leaving it open to the respondent to raise these points before the Tribunal.

After the petition was received by the Tribunal the petitioner before us filed I.A. Nos. 1 and 2 of 1957 on 22nd June, 1957. I.A. No. 1 of 1957 sought the dismissal of the Election Petition No. 147 of 1957 on the ground that the failure to implead Sundararaja Pillai as a respondent was fatal to the petition and that the Tribunal was bound to dismiss it under section 90 (3) of the Act. I.A. No. 2 of 1957 contained a similar prayer for the dismissal of the election petition for the reason that the deposit receipt for Rs. 1,000 which accompanied the election petition was not in due compliance with section 117, in that, it was not a receipt in favour of the Secretary to the Election Commission. Kunju Thevar filed counter-affidavits to both these petitions and also himself filed I.A. No. 3 of 1957 by which he prayed for the deletion of paragraph 7 (*a*) of the petition which ran : "The 2nd respondent (Jayarama Reddiar) would have obtained more votes if the 1st respondent had not resorted to such corrupt practices in the said election" on the basis of which the further additional relief claiming the seat was founded as also the additional relief in the prayer which ran " and further it is also prayed that this Honourable Court may be pleased to declare the second respondent as duly elected candidate in the election ". This application was opposed on several grounds by the present petitioner to some of which we would have to advert a little later. The Tribunal heard all those three applications together and while it allowed I.A. No. 3 of 1957 which prayed for the amendment of the election petition dismissed the other two applications by the present petitioner seeking the dismissal of the election petition. It is the legality of these orders that is challenged in the two petitions now before us.

The Election Tribunal held on a construction of the relevant provisions that a candidate who had retired from the contest was not a " contesting candidate " within the meaning of section 82 (*a*) of the Act. We have already discussed this question in our judgment in W.P. Nos. 573 and 574 of 1957 and we are of the opinion

that the Tribunal was correct in the conclusion that it reached. It would follow from this that the application I.A. No. 1 of 1957 was rightly dismissed.

I.A. No. 2 of 1957 was dimissed by the Tribunal on the ground that what Kunju Thevar did was a substantial compliance with the requirements of section 117. It examined the Head Accountant of the Taluk Sub-Treasury, Madurai (Sri Nataraja Pillai) as a witness. This witness explained that the head of the account was indicated in the receipt as "election R.D.", that is "a revenue deposit", which was entered in the last column of the receipt. The witness also stated that the column as to the head of account was generally filled up by the clerk at the treasury and that the description in that column that the amount was paid as security for costs of election petition was a sufficient description to classify it as a revenue deposit on election account. On the basis of this evidence the Tribunal held that as the purpose of the security was that the amount must be made available to the Election Commission for payment of costs ordered against the petitioner and as the present amount was in fact available to the Election Commission, the omission of the words "Secretary to the Election Commission" was not of any importance and that their absence did not render the deposit one not in compliance with the terms of section 117.

We have already set out the terms of section 117 and the question for our consideration is whether the Tribunal was in error in holding that there had been a compliance with section 117.

Mr. Nambiar learned counsel who appeared for the petitioner strongly urged that the terms of section 85 and section 90 (3) afforded a clear indication that the requirements of section 117 were mandatory. His further argument was that, when once a provision was mandatory it had to be literally complied with, and that there was no question of the Court having power to treat a substantial performance as a compliance with it. In this connection he stressed the fact that section 117 required and insisted on four matters: (1) The sum deposited should be Rs. 1,000. The deposit of a lesser sum, he urged, even though it fell short of the named amount by a trifle would not be any compliance with section 117, and that where there was such a deficit it could not be made up after the period for the filing of an election petition under section 81 had elapsed. (2) The deposit must be in a Government Treasury or Reserve Bank. This condition also was essential, and if the deposit, for instance, was made in a banking institution other than the Reserve Bank, the petitioner could not claim to have complied with the provisions of the section and cannot be permitted to say when the defect was pointed out, that he would have the amount transferred to the Reserve Bank. (3) The receipt must show the deposit in favour of the Secretary to the Election Commission and the head of account should be as security for costs of the petition. He said that though the second part of it was satisfied by the receipt in the present case, it was not in favour of the Secretary to the Commission and therefore was not in compliance with the statute. (4) It was not sufficient if the receipt was obtained by the petitioner and he kept with himself; it must be enclosed with the petition and must reach the Commission within the time specified in section 81. Learned counsel urged that there was no distinction between these four requirements, and that a non-compliance in respect of any one in the sense of there not being a literal compliance with it, was fatal to the maintainability of the petition.

In this connection it was pressed upon us that the requirement that the receipt should be in favour of the Secretary to the Election Commission was not inconsequential, and that the statute had made provision in those exact terms, in particular cases, while other language had been used for different situations. Thus it was pointed out that under sections 118 and 119 on the one hand as contrasted with sections 117 and 119-A on the other, the person in whose favour the deposit was to be made was not indicated though the duty to make the deposit arose out of an order of the Tribunal. It was therefore urged that when under sections 117 and 119-A the deposit was required to be in the name of the Secretary, this should be held to be a mandatory statutory requirement, the non-compliance with which

entitled the dismissal of the petition under sections 85 and 90 (3). Our attention was drawn to *Moorhouse* v. *Linney*: *Thorpe* v. *Linney*[1] and *Scott* v. *Uxbridge and Rickmansworth Railway Company*[2], as authorities for the position that non-compliance with the provisions of the Statute was, unless expressly provided otherwise, fatal in election law. We do not consider these authorities of any relevance for the decision of the present question and therefore desist from examining their facts or the principles on which they rest. Learned counsel also relied on a decision of the House of Lords in *Thomas* v. *Kelly*[3], particularly on a passage in the speech of Lord MacNaughton at pages 519-520. The House was then dealing with the validity of a bill of sale which had departed from the form prescribed therefor by section 9 of the Bills of Sale Amendment Act, 1882. This amending Act enacted :

> " A bill of sale made or given by way of security for the payment of money by the grantor thereof shall be void, unless made in accordance with the form in the schedule to this Act annexed."

The document before the Court was not exactly in that form. The question which was debated in the passage relied on was the degree of departure which would render it not " in accordance with the form ". Lord MacNaughton said :

> " This section seems to me to deal with form and form only. So purely is it, I venture to think, a question of form that I should be inclined to doubt whether a bill of sale would not be void which omitted the proviso referring to section 7 though I cannot see that the omission would alter the legal effect of the document in the slightest degree or mislead anybody. .The words of the Act are 'in accordance with the form ' not ' in the form'. But then comes the question, when is an instrument which purports to be a bill of sale not in accordance with the statutory form ? Possibly when it departs from the statutory form in anything which is not merely a matter of verbal difference. Certainly I should say when it departs from the statutory form in anything which is a characteristic of that form ".

Mr. Nambiar urged that in the present case the reference to the Secretary to the Election Commission was within the words quoted above " characteristic of the form " and that the omission of that name from the receipt was a non-compliance with the terms of section 117, drawing to the petition the penalty of dismissal provided for in section 85 and section 90 (3) of the Act.

We are wholly unable to accept the contention, that the informality complained of, renders the deposit one, not in accordance with the terms of section 117. Even the strict compliance with the terms of the section which is all that the mandatory nature of the provision would call for would not justify the construction urged by learned counsel for the petitioner. Take for instance the case of the amount of deposit. Section 117 requires that this sum should be Rs. 1,000. A deposit of a lesser sum would certainly not be a compliance with this provision. But suppose the petitioner deposited a sum in excess of Rs. 1,000, say Rs. 1,500. Could it be said that this was a non-compliance with the terms of section 117 which required a petitioner to deposit Rs. 1,000 ? A literal construction of the section might mean that it required a deposit of Rs. 1,000, neither more nor less, and that a deposit in excess suffered from the same infirmity of departure from form, as the deposit of a lesser sum. We are satisfied that strict compliance of the section does not require the sort of literal compliance which the above instance illustrates. Similarly learned counsel cannot contend that clerical errors in the receipt, say errors committed in spelling, would render the receipt one not in conformity with the section. In our opinion the purpose which the deposit is intended to fulfil is a legitimate matter which can and ought to be taken into account in approaching the problem as to whether there has been a compliance with section 117 or not. This purpose is to be found in section 121, where if payment of costs is ordered by the Tribunal, the amount in deposit is made available by the Election Commission to satisfy such order. Approached from this aspect the question we put to ourselves is, was the amount deposited in such form that it is available to the Commission for the payment of costs to the successful party in case an order to that effect was passed by the Tribunal. In the present case it was not in dispute that notwithstanding the absence of the name of the Secretary to the Commission in the receipt, the amount, having regard to the other entries in the receipt, was treated as a credit

1. (1885) L.R. 15 Q.B.D. 273.
2. (1866) L.R, 1 C. P. 596.
3. (1888) L.R. 13 A. C. 506.

to the Election Commission and was available to the respondent in the election petition which Kunju Thevar had filed. In these circumstances we hold that the Tribunal was right in holding that the terms of section 117 were complied with and in dismissing the application No. 2 of 1957.

The next point raised by learned counsel for the petitioner was as regards the order of the Tribunal allowing the amendments prayed for by I.A. No. 3 of 1957. Four grounds were urged against the propriety or legality of this order: (1) The ground upon which the amendment was allowed was that paragraph 7 (*a*) and the prayer seeking the further relief, that Jarayama Reddiar should be declared, elected, hadbeen included in the petition by mistake, without the knowledge of Kunju Thevar. Learned counsel urged that there was no material on which this finding as to mistake could rest. (2) The Tribunal had no jurisdiction to amend the petition or permit the petition to be amended, because the election petition itself was one not in accordance with law as complying with the statutory requirements of section 82 and section 117 of the Act and that the power to amend extended only to petitions which were in proper form conforming to the requirements of the Act. (3) The Tribunal had no jurisdiction to grant the amendment because by the date of the application for amendment the time within which an election petition could be filed under section 81 of the Act had long passed. (4) An amendment by which the prayer for further relief was given up was tantamount to the withdrawal of a portion of the petition which attracted the provisions of sections 108 to 111 of the Act, and that the Tribunal erred in permitting this withdrawal without observing the statutory procedure there prescribed.

The first of the grounds of complaint which we have set out above arises out of the basis upon which the Tribunal has passed its order allowing the amendment. This is stated in paragraph 18 of the order in these terms :

"It is very satisfactory to note that the senior and junior counsel for the petitioner confessed their mistake in the matter and the learned counsel for the 1st respondent very fairly did not question the truth of their version as to the circumstances under which paragraph 7-A and the latter part of the prayer happened to find a place in the petition. In this view, these portions should be regarded as not intended to form part of the petition and not having really existed at any time, and so regarding it, the petition is merely one with a prayer for a declaration that the election of the 1st respondent as a candidate is void and if that is so, no question of defect of parties under section 82 at all arises. I believe the version of the accidental mistake pleaded on behalf of the petitioner and hold that the petitioner never meant to include in the petition either paragraph 7-A or the relief for a declaration that the 2nd respondent was duly elected."

Learned counsel for the petitioner subjected this paragraph to very severe criticism on the ground that the case of accidental mistake mentioned in the paragraph was never even alleged by Kunju Thevar. In our opinion this criticism is fully justified. The petition presented to the Election Tribunal contains paragraph 7 (*a*) in manuscript and the relief portion seeking the further declaration regarding the election of Jayarama Reddiar is in type. The petition bears the signature in English of Kunju Thevar in two places both at the end of the petition and in the affirmation paragraph. In the affirmation itself it is not stated that the contents of the petition were translated to Kunju Thevar and on the other hand it proceeds on the basis that Kunju Thevar was acquainted with English and had signed and verified knowing its contents. The Election Commission issued a notice to Kunju Thevar asking him to show cause why the petition should not be dismissed for non-compliance with section 82 in that Sundararaja Pillai was not impleaded to the petition under which a further declaration as regards Jayarama Reddiar had been sought. On receipt of this communication a memo. was filed on his behalf explaining why the petition was in order. In its paragraph 3 he stated :

"As the interval is too short between 8th May, 1957 (when Kunju Thevar received a communication from the Election Commission) and 10th May, 1957 (on which he was asked to show cause) to allow engagement of counsel for showing cause the petitioner is obliged to send this explanation by registered post under section 82 of the Representation of the People Act. The petitioner will have to implead all the contesting candidates only if the petitioner wants a declaration that he himself or any other candidate has been duly elected.

"4. When no such further declaration is claimed only the returned candidates are necessary parties to the election.

5. It is submitted that under section 82 candidates who have either withdrawn their nomination or retired from the contest under section 55-A are not necessary parties to an election petition."

We have already adverted to the fact that the Election Commission referred the petition to the Tribunal giving an opportunity to the respondent to raise these points by way of preliminary objection.

The next stage was of course the filing of the application I.A. No. 3 of 1957. In the affidavit in support of this application there is not a whisper that the paragraph 7 (*a*) and the prayer portion had crept into the petition without Kunju Thevar's knowledge. What, however, was asserted was that the senior counsel who had been entrusted with the task of drafting the petition had included neither the allegations in paragraph 7 (*a*), nor the second part of the prayer, but that they were inserted by the junior counsel when the manuscript draft was got typed. Paragraph 7 (*a*) it might be mentioned which is in manuscript is in the handwriting of the junior counsel. We consider it important to set out the exact words used in this affidavit because they show that it was never the case of Kunju Thevar that *he* had committed any mistake or that *he* had no knowledge of the existence of this paragraph at the time *he* signed it. In this affidavit paragraphs 3 and 4 relate to the legal contentions that a candidate who had retired was not a contesting candidate who had to be impleaded under section 82. Then it goes on :

"6. In the draft prepared by the senior counsel paragraph 7 (*a*) did not appear. The prayer paragraph also had not been written up.

7. The draft in the handwriting of my senior counsel is herewith produced.

8. My senior counsel has left Madurai to attend a marriage at Kumbakonam on the 17th. I came to Madurai on the 18th with the particulars required.

9. The junior counsel owing to mistake has added paragraph 7 (*a*) and the second part of the prayer.

10. In the body of the petition as originally drafted by the senior counsel there was no allegation which called for a declaration to the effect that S. Jayarama Reddiar should be declared duly elected and consequently senior counsel never expected that a prayer would be added which was not warranted by the allegations as originally drafted.

11. Thus it will be clear that paragraph 7 (*a*) and the second part of the prayer was due to a mistake. It was the senior councel's recollection of his own draft that was responsible for the memo. sent to the Secretary, Election Commission."

No oral evidence was led by Kunju Thevar and therefore the only materials before the Tribunal in relation to this matter were the manuscript draft in the handwriting of the senior counsel, the memo. submitted to the Election Commission and the affidavit in support of I.A. No. 3 of 1957. The Tribunal in its order has referred to statements made at the Bar by learned counsel who appeared for Kunju Thevar and to the fact that they admitted that they had committed some mistake. The mistake which they obviously could have owned was only in relation to what they did, namely, the senior counsel not having included the portions whose deletion was sought in the petition and the junior counsel that he added them himself without appreciating the terms of section 82. The Tribunal further referred to the concession made by counsel for the respondent in not contradicting the mistakes owned by counsel for the petitioner. The concession of counsel for the respondent referred to by the Tribunal, could not have extended to anything more than that he did not dispute that the senior counsel was not responsible for paragraph 7 (*a*) or the additional prayer. In the order of the Tribunal the mistake admitted by counsel for Kunju Thevar and the concession made by learned counsel for the respondent are stated somewhat in broad terms as if these could support the finding that Kunju Thevar had not in truth subscribed to paragraph 7 (*a*) or the additional prayer. In view of the ambiguity in the manner in which this concession is referred to by the Tribunal an affidavit has been filed before us on behalf of the petitioner enclosing as part of it a letter from the learned Advocate-General who appeared for the petitioner before the Tribunal to Mr. Nambiar setting out the matters that transpired before the Tribunal in relation to " the mistake". In this letter the learned Advocate-General confirms what we have already stated as to the nature and contents of the statement by counsel for Kunju Thevar. The contents of this

letter of the Advocates-General has not been contraverted by any affidavit or even by a statement from the Bar from the other side and we are fully satisfied that it represents correctly the statements made before the Tribunal. In the light of this, we are clearly of the opinion that there was no basis for the statement by the Tribunal, which reads as if Counsel for Kunju Thevar had asserted that the latter was not aware of the inclusion of paragraph 7 (*a*) and of the additional prayer in the petition and had signed it in ignorance and that counsel for the returned candidate did not challenge that assertion.

In this connection some point was sought to be made before us by learned counsel for the respondent out of paragraph 4 of the memo. sent to the Commission in answer to its notice under proviso to section 35. Learned counsel suggested that the paragraph showed that Kunju Thevar might not have been aware that a further declaration had been asked for in the petition filed. We are wholly unable to accept this submission. Even in paragraph 11 in the affidavit in support of I.A. No. 3 of 1957, paragraph 4 is referred to as indicative of the recollection of the senior counsel and not that Kunju Thevar was not aware of the precise contents of this petition when it was despached. But this apart, it seems to us that in the context in which this paragraph appears it was intended to convey quite a different meaning. Paragraph 4 has to be read in conjunction with paragraph 3 and the point raised in this earlier paragraph was that the further relief referred to in section 82 was confined to those cases where a petitioner in an election petition claimed a seat for himself and not to a case like the present where the seat was claimed not on behalf of the petitioner but for a third party. It would thus be seen that there was no foundation for the finding of the Tribunal that paragraph 7 (*a*) and the additional prayer in the election petition were included in it by mistake without the knowledge of the election petitioner. The fact that the senior counsel had not drafted paragraph 7 (*a*) and was not aware of his junior counsel having included that paragraph and the relief based thereon, which is all the material the Tribunal had before it, could never lead to the finding that junior counsel had no authority to include paragraph 7 (*a*) and the further relief claiming the seat, and of course not to the other finding that Kunju Thevar was not aware of the contents of the petition which he filed before the Tribunal. In our judgment the entire reasoning and finding of the Tribunal in paragraph 18 of its order are erroneous and the allowance of the application I.A. No. 3, on this ground was wholly unwarranted.

The second and third grounds urged by learned counsel proceed on the basis that the petition as filed, with paragraph 7 (*a*) and the additional prayer, was defective for non-compliance with the provisions of section 82 (*a*). We have held that a candidate who had retired from contest under section 55-A (2) is not a contesting candidate within section 82 (*a*). and from this it follows that the petition as filed was in order. Considerable argument was addressed to us whether an election petition which failed to conform to the requirements of section 82 (*a*) could be amended and whether the Tribunal could have jurisdiction to permit such amendments. In view however of our conclusion that the petition was not defective, we refrain from examining these contentions. Grounds 2 and 3 urged in attack of the validity of the order allowing I.A. No. 3 of 1957 must be repelled.

If the petition were in order it is not contested that a petitioner might amend it and this brings us to the last ground urged regarding the non-compliance with the provisions of sections 108 to 111 of the Act. Some authority was cited before us for the position that an amendment of a petition whereby a prayer for the further relief was given up, amounted to a withdrawal of the petition in part, attracting the safeguards provided by sections 108 to 111. In view however of the considerations to which we shall immediately refer, we do not think it profitable or necessary to canvass the correctness of this argument. Mr. Nambiar told us that he had raised the objection about the non-compliance with sections 108 to 111 merely as an argument for showing that the amendment ought not to have been allowed, and that he was not desirous that Kunju Thevar should follow the procedure prescribed by sections 108 to 111 if we were of the opinion that an amendment was permissible. In the circumstances in which the amendment was applied for,

it is clear that there was no question of any bargain between the parties. This apart, taking into account all the circumstances of the case it appears to us that no purpose would be served by following the procedure prescribed by the provisions in section 108, etc. At the date of the petition for amendment no charge of recrimination against Jayarama Reddiar had been made and no such recrimination could take place because it was barred by limitation under the proviso to section 97 (1). It is these circumstances which we have taken into account in holding that it is not necessary to interfere with the order of the Tribunal on the ground that the procedure prescribed by sections 108 to 111 had not been followed assuming that the giving up of a further relief amounts to a withdrawal in part of the petition.

The next question to be considered is whether it is necessary to interfere with the order of the Tribunal allowing the petitioner to delete paragraph 7 (*a*) and the last portion of the prayer. If the petition was in order and we have held that it was so—Kunju Thevar could have the petition amended and the Tribunal would have jurisdiction to permit such amendment. In I.A. No. 3 of 1957 Kunju Thevar did pray for the deletion of these portions of the petition and that prayer has been granted by the Tribunal. We do not see therefore any reason to interfere with the order of the Tribunal allowing this petition for amendment though, as we have stated earlier, the ground upon which this order was based is erroneous.

Before concluding it is necessary to refer to a preliminary objection raised by Mr. Kuppuswami Ayyar, learned Counsel for the respondent. He urged that the orders sought to be quashed were of an interlocutory nature and that in view of the provision for an appeal from a final order on the Election Petition under section 116-A, this Court could not interfere with interlocutory orders under Article 226. We do not see much substance in this contention but in view of our decision on the merits, we do not consider it necessary to discuss this point in any detail and so refrain from doing so.

The result is that these petitions fail and stand dismissed. The rules issued will be discharged. There will however be no order as to costs.

V.S. ——— *Writ petitions dismissed.*
Rules discharged.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE RAJAGOPALA AYYANGAR.

M. Lingappa Chetty .. *Petitioner**

v.

President, Ammanarkoil Panchayat and others .. *Respondents.*

Madras Village Panchayats Act (X of 1950), section 96 (3)—Application for a licence—Orders not communicated within thirty days by the Panchayat—Legal effect of.

Under section 96 (3) of the Panchayat Act a panchayat or a local authority had a period of thirty days within which to signify their refusal to grant a licence applied for under section 96 (1) and if they did not do so the statute under sub-section (3) clothed the applicant with rights and enabled him to treat himself as being the grantee of the licence. The panchayat would not have power to refuse a licence after the period of thirty days, whatever might be the reason.

Petition under Article 226 of the Constitution of India, praying that in the circumstances stated in the affidavit filed therewith the High Court will be pleased to issue a writ of *certiorari* calling for the records relating to the order of the President, Ammanarkoil Panchayat Board, Tirupattur Taluq, North Arcot District, dated 10th January, 1955 refusing to issue a licence to the petitioner for running rice mill, and quash the said Order.

N. R. Ragavachari, for Petitioner.

The Additional Government Pleader (*K. Veeraswami*), for Respondents.

* W.P. No. 1032 of 1956. 10th September, 1957.

The Court made the following

ORDER.—The petitioner desired to instal an oil engine within the area of Ammanarkoil Panchayat, Pudupet Post, Tirupattur Taluk. He made his application for this purpose on 22nd March, 1954. The first formal reply that he got to this application was on 19th January, 1955 when an order, dated 10th January, 1955, refusing the grant of the licence he applied for was intimated to him.

The question that the learned Counsel for the petitioner urged turns on the legal effect of section 96 (3) of Madras Act X of 1950, the Panchayat Act. Section 96 (1) enacts the provision for applications being made for the issue of a licence or permission under the Act or the rules or by-laws made under it. There is no controversy that the terms of section 96 (1) were complied with by the petitioner when he made his application for the installation of the oil engine on 22nd March, 1954. Sub-section (3) of section 96 enacts :

"Save as aforesaid, if orders on an application for any such licence or permission are not communicated to the applicant within thirty days or such longer period as may be prescribed in any class of cases after the receipt of the application by the executive authority the application shall be deemed to have been allowed for the period if any, for which it would have been ordinarily allowed and subject to the law, rules, by-laws and regulations and of conditions ordinarily imposed".

The learned Counsel for the petitioner urged that under the terms of section 96 (1) read with section 96 (3), a panchayat or local authority had a period of thirty days within which to signify their refusal to grant the application made under section 96 (1) and that if they did not do so, the statute under section 96 (3) clothed the applicant with rights and enabled him to treat himself as being the grantee of the licence. If the learned counsel were right here, the panchayat would not have power after the expiry of one month to refuse the licence. I have already set out the terms of section 96 (3) and I do not see any answer to the contention urged on behalf of the petitioner. The refusal of the licence was communicated to the petitioner nearly ten months after the application and whatever might be the reason for this delay, it is not relevant on the terms of section 96 (3).

The petitioner is entitled to the relief he seeks in the petition and the order of the first respondent, refusing the licence is quashed. There will be no order as to costs in the petition.

V.S. ——— *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE SOMASUNDARAM.

Meenal .. *Appellant**

v.

Subbiah Naidu, Sub-Inspector of Police, Kadaladi .. *Respondent.*

Madras District Police Act (V of 1861), section 53—Prior notice of intended action against police official —Not required for criminal prosecution.

Section 53 of the Madras District Police Act refers to two kinds of proceedings, *viz.*, actions and prosecutions that may be brought against a police officer by persons complaining of their conduct. Actions are treated as different from prosecutions. While the period of limitation of three months before which the proceedings should commence apply both to actions and prosecutions the requirement as to one month's notice applies only to actions, which mean civil actions as distinguished from prosecutions which are criminal in nature. In respect of criminal prosecutions no such notice is necessary under section 53 of the Act.

Appeal under section 417 of the Code of Criminal Procedure, 1898, against the acquittal of the aforesaid Respondent (Accused) by the Sub-Divisional Magistrate of Ramanathapuram in C. C. No. 51 of 1957 on his file.

M. Narayanamurthy for *K. Narayanaswami Mudaliyar* and *M. Tirugnanasundaram*, for Appellant.

The Public Prosecutor (*P. S. Kailasam*), for Respondent and on behalf of the State.

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*Criminal Appeal No. 417 of 1957. 20th November, 1957.

The Court delivered the following

JUDGMENT.—This is an appeal against the order of the Sub-Divisional Magistrate of Ramanathapuram in Calendar Case No. 51 of 1957 on his file. The case was taken on file on a private complaint preferred by the appellant herein. The appellant is the wife of one Tirukkana Thevar, to arrest whom the police went on 10th March, 1957 at about 4 A.M. The police went with a posse of constables as Tirukkana Thevar was wanted in connection with a dacoity case. The appellant is said to have been sleeping in the pial of the house. The accused who was the Sub-Inspector went along with others, woke her up and asked her where her husband was. She told the Sub-Inspector that he had gone to Paramakudi. The accused was not satisfied with the answer and charged her with hiding her husband in the house. She was asked to open the door. The accused went inside the house and according to the allegations in the complaint, broke the vessels,—mud pots and chattis—inside the house and further questioned the appellant as to where she was hiding her husband, asking her to surrender him. She was also threatened that she would be put to disgrace if she did not speak the truth. So saying, it is alleged, the accused dragged her outside by her hand. When the appellant questioned him as to why she was being treated like that, the accused is said to have replied that unless she was dishonoured, her husband would not come. She shook off the grip of the Sub-Inspector, and immediately, it is said, the Sub-Inspector became furious and beat her on her head with the lathi that he had in his hand. Blood came out and it is said that he again beat her with the lathi. She mentions the names of the persons who were watching the occurrence and how they tried to prevent it without any success. Next day, she went and obtained a medical certificate, and thereupon filed this private complaint.

The Sub-Inspector took a preliminary objection on the ground that the Madras District Police Act would apply to the facts of this case, and, according to section 53 of this Act, notice in writing of the intended action should have been given to the District Superintendent of Police one month at least before the commencement of the action against the accused, and that, as there was no notice given, this case ought to be thrown out. The Sub-Divisional Magistrate upheld the contention that notice was necessary, and acquitted the accused under section 245 (1), Criminal Procedure Code. It is against this order that this appeal has been filed by the complainant.

The question is whether section 53 will apply to the facts of this case and whether the complainant must give one month's notice of this action to the District Superintendent of Police. Section 53 runs as follows:

"All actions and prosecutions against any person, which may be lawfully brought for (anything done or intended to be done, under the provisions of this Act, or under the provisions of any other law for the time being in force conferring powers on the police) shall be commenced within three months after the act complained of shall have been committed and not otherwise; and notice in writing of such action and of the cause thereof shall be given to the defendant, or to the Superintendent or other superior officer of the District in which the act was committed one month at least before the commencement of the action; and no plaintiff shall recover in any such action, if tender of sufficient amends shall have been made before such action brought, or if a sufficient sum of money shall have been paid into Court after such action, brought by or on behalf of the defendant and though a decree shall be given for the plaintiff in any such action, such plaintiff shall not have cost against the defendant, unless the Judge, before whom the trial shall be, shall certify his approbation of the action:

"Provided always that no action shall in any case lie where such officers shall have been prosecuted criminally for the same act".

It is clear from the wording of the section that it refers to two kinds of proceedings: (1) actions (2) Prosecutions. The very language used shows that actions are different from prosecutions. Both actions and prosecutions must be commenced within three months of the act complained of. But, in respect of action, notice in writing of the action and the cause thereof shall be given either to the defendant or to the Superintendent or other superior officer of the District in which the act was committed. It is further stated that no plaintiff shall recover in any such action, if tender of sufficient amends shall have been made before such action, brought, or if a suffi-

cient sum of money shall have been paid into Court after such action brought by or on behalf of the defendant. It further refers that though a decree shall be given for the plaintiff in any such action, such plaintiff shall not have cost against the defendant, unless the Judge, before whom the trial shall be, shall certify his approbation of the action. There is a proviso to the section which shows that no action shall in any case lie where such officers shall have been prosecuted criminally for the same action. It is therefore clear that the expression 'action' means civil action as distinguished from prosecutions which are criminal in nature. Though to both civil actions as well as prosecutions there is a limitation period prescribed, namely, three months, within which the actions or prosecutions should be brought, it is only in respect of an action that one month's notice must be given. The further expression that is used, namely, the defendant, clearly shows that action refers only to a civil suit. Throughout the section, wherever 'action' is referred to, the expression 'defendant' and the expression 'plaintiff' and also the expression suggesting damages is mentioned. Therefore, it is only in respect of civil actions that one month's notice is necessary; but in respect of criminal prosecutions, such notice is not at all necessary under the provisions of section 53 of the District Police Act. So far as the complaint is concerned, it has been filed almost the next day, in any event, within three months after the act complained of and therefore, there is no bar to the criminal prosecution.

In these circumstances, the order passed by the Sub-Divisional Magistrate is liable to be set aside, and it is therefore set aside. The Sub-Divisional Magistrate will restore the case to his file and dispose of it according to law. The case will be heard by a Sub-Divisional Magistrate other than the one who has heard and passed order under appeal.

R.M. *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE RAJAGOPALA AYYANGAR.

Gordon Woodroffe and Company (Private) Limited (Madras) .. *Petitioner**

v.

S. Venugopal and another .. *Respondents.*

Industrial Disputes Act (*XIV of* 1947), *section* 33 [*as amended by Act* (*XXXVI of* 1956)]—*Construction—Permission of Tribunal sought by employer to punish employee—Power of the Tribunal to go into the question of the degree of punishment.*

Constitution of India (1950), *Article* 226—*Judge of High Court constituted Industrial Tribunal—Orders of—Interference with by the High Court under Article* 226.

Under the scheme of the Industrial Disputes Act, 1947, as amended from time to time, where an employer applies to the Tribunal for permission to inflict punishment on his workman under section 22 or 33 of the Act, the Tribunal is concerned with two matters, *viz.*, (i) Is the act of the employer *bona fide* or is it intended to victimise the workmen for their act in raising the dispute or continuing it? (ii) Is there a *prima facie* misconduct on the part of the workman justifying the employer in inflicting the punishment?

It is not within the scope of the jurisdiction of the Tribunal to go into the question of the unreasonableness of the punishment imposed by the employer on the employee and substitute a punishment which it considers reasonable, different from those inflicted by the management. If the punishment inflicted by the employer is unduly harsh or is not justified by the facts and circumstances of the case, it might be the subject of a separate industrial dispute which should be adjudicated upon on a reference by the appropriate Government under section 10 of the Act, if the issue is taken up by the workmen as a body.

The amendment of section 33 by the Amending Act in 1956 does not make any material difference. The power of the Tribunal is even now only to approve or not to approve the action of the employer and it does not extend to its adding conditions to its approval. The propriety of the quantum of punishment given by the employer should only be adjudicated in independent appropriate proceedings.

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*W.P. Nos. 596 and 597 of 1957. 14th October, 1957.

(Case-law discussed and growth of the Legislation traced).

Where a Judge of the High Court had been constituted the Industrial Tribunal, it cannot be said that virtually the order of such Tribunal was that of a Judge of the High Court and therefore the High Court had no power to interfere with such orders under Article 226 of the Constitution. The High Court has the power to interfere with such order.

In re *Hayles*, (1955) 1 M.L.J. 375 (F.B.) and *Queen* v. *Appellate Tribunal, The Champion Paper Fibre Co.*, 1956 R.P.C. 323, relied on.

Petition under Article 226 of the Constitution of India praying that in the circumstances stated therein and in the affidavit filed therewith the High Court will be pleased to issue a writ of *certiorari* calling for the records in Petition No. 4 in Industrial Dispute No. 3 of 1957 on the file of the Industrial Tribunal, Madras and quash the Order, dated 8th July, 1957, in Petition No. 4 in I.D. No. 3 of 1957 in so far as it relates to the condition of the period of dismissal (which is a mistake for suspension) being commuted into one of leave on loss of pay.

The Advocate-General (*V. K. Thiruvenkatachari*) for *King* and *Partridge*, Attorneys, for Petitioner in both petitions.

S. Mohan Kumaramangalam and *K. V. Sankaran*, for 1st Respondent in both petitions.

The Court made the following

ORDER.—The principal, if not the only point raised in these two writ petitions which seek the issue of writs of *certiorari* to quash two orders of the Industrial Tribunal, Madras, is as to the proper construction of section 33 of the Industrial Disputes Act (XIV of 1947) as enacted by the Amending Central Act XXXVI of 1956.

Messrs. Gordon Woodroffe & Company are the petitioners in these two writ petitions. There was an industrial dispute between the petitioners, management, and their workmen regarding the quantum of bonus for the year ended 30th June, 1956. The dispute was referred for adjudication to the Industrial Tribunals, Madras, by the State Government by their Order, dated 17th April, 1957. The Tribunal decided this dispute by its order, dated 19th July, 1957, but the decision of the Tribunal on this dispute is not relevant to the present proceedings but the petition is concerned with certain events which transpired during the pendency of this industrial dispute. During the period 17th April, 1957 and 19th July, 1957, the management charged two of its employees, who are the contesting respondents in these two writ petitions, with misconduct, unconnected with the pending dispute. The concerned workmen were served with charge-sheets. Their explanations were obtained and an enquiry was conducted. The management passed orders on the basis that the misconduct charged against the employees was established. On 27th April, 1957, the respondent in W.P. No. 596 of 1957 was dismissed, while the respondent in W.P. No. 597 of 1957 was discharged from service by an order, dated 3rd May, 1957. The management also tendered one month's salary in lieu of notice to each of these two workmen. The management thereafter filed on 9th May, 1957, two petitions before the Industrial Tribunal, Madras, purusant to section 33 (2) of the Industrial Disputes Act, 1947, as amended, seeking "the approval" of the Tribunal to the action taken by them, namely, to punish their employees in the manner mentioned above. The Tribunal passed orders granting a qualified approval of the action of the management, and directing punishments different from those inflicted by the management and it is the legality of these orders that is challenged in these two petitions.

I shall first take up for consideration W.P. No. 596 of 1957—the workman in question was a Shorthand-Typist. The charges against him were that he had on 25th April, 1957, contrary to the instructions given to him, refused to copy a weight list and (2) that he had on 25th April, 1957, contrary to the instructions given to him refused to type a bill of lading given to him. These items of misconduct charged against the employee were the subject-matter of an enquiry by the management and

as stated before they were held established. On this finding the management ordered the dismissal of this employee "subject to the approval of the Tribunal" as required by section 33 (2) of the Act. It is this approval that was sought by the management in their petition to the Tribunal numbered as Petition No. 4 of 1957. The facts alleged against the workman were investigated by the Industrial Tribunal and Mr. Ramaswami Gounder, a learned Judge of this Court, who constituted the Tribunal, recorded:

"I am constrained to hold that the work of a Shorthand-Typist to which post Venugopal (respondent in W.P. No. 596 of 1957) was appointed was not confined to mere stenographic work but comprised also copy-typing work. It follows that when he refused to type the weight list and the bill of lading on the 25th and 26th of April, 1957, respectively he was guilty of disobedience. The management was, therefore, justified in taking action against him which they did and which I am bound to approve."

The Tribunal then went on to consider whether the punishment of dismissal imposed by the management was not excessive. After overruling the contention raised on behalf of the managment based on certain decisions of the Supreme Court as regards the jurisdiction of the Tribunal to embark on this enquiry the Tribunal held that the decisions of the Supreme Court were rendered on the Act as it stood before it was amended in 1956 and that on the terms of the amending section, he had jurisdiction to pass such orders as appeared to him to be appropriate and that in the circumstances of the case he would not permit the order of dismissal to stand but would reduce it "to leave on loss of pay for the period from the date of the dismissal to the date of the order of the Tribunal."

The learned Advocate-General who appeared for the petitioner submitted that the amendments to section 33 introduced by the Act of 1956 did not make any basic alteration in the powers of the Tribunal and that the decisions of the Supreme Court still governed the powers and jurisdiction of Industrial Tribunals dealing with applications under section 33.

Before referring to the decisions of the Supreme Court adverted to earlier it is necessary to set out the various changes which the relevant provisions of the Industrial Disputes Act have undergone from time to time. I shall start with Act XIV of 1947 which introduced compulsory arbitration in this country for the first time. After making provision for referring industrial disputes *inter alia* to Industrial Tribunals by an order of the appropriate Government, the enactment made provision for the maintenance of the *status quo*, during the pendency of these proceedings. Under section 23 (*b*) strikes and lock-outs were prohibited during the pendency of proceedings before Tribunals and for two months after the conclusion of such proceeding and provided penalties by section 26 for illegal strikes and lock-outs. Further section 33 enacted :

"No employer shall during the pendency of any conciliation or proceedings before a Tribunal in respect of any industrial dispute, alter to the prejudice of the workmen concerned in such dispute, the conditions of service applicable to them immediately before the commencement of such proceedings nor save with the express permission in writing of the Conciliation Officer, Board or Tribunal as the case may be, shall he during the pendency of such proceedings, discharge, dismiss or otherwise punish any such workmen except for misconduct not connected with the dispute."

The expression "pendency of the proceedings before a Tribunal" was so to speak defined by section 20 (3) of the Act in these terms :

"proceedings before a Tribunal shall be deemed to have commenced on the date of the reference of a dispute for adjudication and such proceedings shall be deemed to have concluded when the award is published by the appropriate Government under section 17 or where an award has been laid before the Legislative Assembly under the proviso to sub-section (2) of section 15, when the resolution of the Legislative Assembly therein is passed". Any employer who contravened the provisions of section 33 was subjected under section 31, to punishment "with imprisonment for a term which may extend to six months or with fine which may extend to one thousand rupees, or with both".

Section 33 underwent several modifications whose effect is the main point for consideration in these petitions, but before I pass on to consider them I shall analyse the basic features of the section as enacted in 1947. The provision was intended to preserve the *status quo* during the pendency of proceedings *inter alia* before Tribunals and for that duration: (1) the employer was absolutely prevented from queering the

pitch by any prejudicial alteration in the conditions of service of his employees; (2) in regard to misconduct of employees connected with the dispute the express permission in writing of the Tribunal had to be obtained before the employer could discharge, dismiss or otherwise punish the workman, the "permission" being thus, needed for every type of punishment; (3) where the misconduct was not connected with the dispute, the Common Law power of the employer was left untouched and he could deal with his workmen in the manner open to him under the law without being fettered in any manner by the pendency of the dispute.

The next stage in the legislation was when the Industrial Disputes (Appellate Tribunal) Act (XLVIII of 1950), was enacted. Under the Original Act of 1947 the awards of the Tribunals were final and were, when published by the appropriate Government, binding upon the parties and could not be called in question in any manner: *vide* section 15 (4) of the Act. The Industrial Disputes Act (XLVIII of 1950) made an inroad into this state of affairs by creating a Labour Appellate Tribunal which was vested with jurisdiction to hear appeals from the awards, and decisions of the Industrial Tribunals in respect of particular matters. The Act also introduced amendments to the Industrial Disputes Act of 1947. It amended section 33 to read thus:

"*Section 33: Conditions of service, etc., to remain unchanged during the pendency of proceedings.*—During the pendency of . . . . before a Tribunal in respect of any industrial dispute, no employer shall—

(*a*) alter, to the prejudice of the workmen concerned in such dispute the conditions of service applicable to them immediately before the commencement of such proceedings; or

(*b*) discharge or punish whether by dismissal or otherwise any workman concerned in such dispute,

save with the express permission in writing of the Conciliation Officer, Board or Tribunal as the case may be."

This Amending Act also introduced a new section 33-A reading:—

"*Section 33-A: Special provision for adjudication as to whether conditions of service, etc. changed during pendency of proceedings.*—Where an employer contravenes the provisions of section 33 during the pendency of proceedings before a Tribunal, any employee aggrieved by such contravention may make a complaint in writing in the prescribed manner to such Tribunal and on receipt of such complaint that Tribunal shall adjudicate upon the complaint as if it were a dispute referred to or pending before it, in accordance with the provisions of this Act and shall submit its award to the appropriate Government and the provisions of this Act shall apply accordingly".

Provisions on the same lines as sections 33 and 33-A were enacted in respect of proceedings before the Labour Appellate Tribunal newly constituted, by sections 22 and 23 of Act XLVIII of 1950 whose terms were exactly identical with the amended section 33 and the new section 33-A of the Industrial Disputes Act.

This might probably be a convenient stage where the precise changes effected by the amendment to section 33 and the introduction of section 33-A brought about in the position as it was under section 33 of the Act of 1947 might be pointed out.

(1) The absolute ban on employers prejudicially altering conditions of service of the workmen concerned in the industrial dispute was modified by making this possible with the express permission in writing of the Tribunal before which the dispute was pending.

(2) The right of the employer to punish his workmen for his misconduct unconnected with the dispute which was untouched by section 33, as it originally stood, was modified and this also was made subject to the obtaining of the permission in writing of the Industrial Tribunal. In other words the variation in the power of the employer to punish for misconduct based upon, whether the misconduct was connected or was unconnected with the dispute was done away with;

The expression "other punishments" in section 33 of the Act of 1947 might conceivably have been construed as *ejusdem generis* with the words "discharge or dismiss". This was clarified and the new section 33 which used the words "to discharge or punish whether by dismissal or otherwise" thus including every punishment, both those which amounted to dismissal or fell short of it.

Before proceeding to detail the changes introduced by the Amending Act XXXVI of 1956 I shall refer to the decisions of the Supreme Court which have construed either section 22 and 23 of the Labour Appellate Tribunal Act or sections 33 and 33-A of the Industrial Disputes Act, (between which two there was no material differences), in relation to the scope and jurisdiction of the Tribunals to whom applications might be made for the permission referred to in the provisions.

It is not necessary to advert to authorities of date earlier than 1955—*The Automobile Products of India, Ltd.* v. *Rukmaji Bala and others*[1], on the construction of sections 22 and 23 of the Labour Appellate Tribunal Act or corresponding sections 33 and 33-A of the Industrial Disputes Act, 1947. The employer company who was the appellant before the Supreme Court became obliged to retrench its workmen by reason of inability to provide full work for their workmen. There were some disputes between the appellant and its workmen pending before the Labour Appellate Tribunal and in consequence the appellant company applied to the Tribunal for permission to retrench under section 22 of the 1950 Act. The workmen objected to the grant of permission on several grounds including a charge that the employers were moved by *mala fide* reasons in effecting the retrenchment. The Labour Appellate Tribunal whose decision was brought before the Supreme Court in appeal by way of special leave, had after negativing the contention of the workmen that the discharge was *mala fide* stated as to scope of their power :

> " We are the authority to whom an application has to be made for permission to retrench and when such application is made, we must of necessity exercise our judgment and discretion and satisfy ourselves that when the company retrenches it does justice by its employees ".

On this view they granted permission to effect the retrenchment but subject to the condition that each workman was paid at the rate of half of his basic wages and dearness allowance for the whole period from the date of lay off up to the date of the retrenchment. The legality of this order was challenged before the Supreme Court. The appeal was allowed and the decision of the Labour Appellate Tribunal set aside. Das, J. (as he then was), analysed the provisions of sections 22 and 23 newly introduced and stated that four things were to be noted, namely, (*i*) that the ordinary and primary jurisdiction of the Appellate Tribunal was appellate ; (*ii*) that section 22 of this Act conferred on the Appellate Tribunal a special jurisdiction which was in the nature of an original jurisdiction, (*iii*) that section 23 also vested in the Tribunal an additional jurisdiction " to decide the complaint as if it were an appeal pending before it " and (*iv*) that section 23 conferred on the workmen an additional remedy which they did not have under the 1947 Act. After referring to the new section 33 His Lordship stated :

> " It will be noticed that this section has made several changes. Thus under this section provision is made for obtaining permission as a condition precedent, both for altering the conditions of service and for discharging or punishing the workmen and no exception is made for a case of misconduct unconnected with a pending dispute "

and after noticing the terms of section 33-A His Lordship said :

> "It may be pointed out that the new sections 33 and 33-A thus inserted into the 1947 Act conferred distinct benefits on the workmen and give some additional jurisdiction and power to the authorities mentioned therein. Section 33-A enjoins the Tribunal to decide the complaint as if it were a dispute referred to or pending before it and to submit its award to the appropriate Government and provides that the provisions of the Act shall apply to the award. It is quite clear that the provisions of these two new sections 33 and 33-A of the 1947 Act correspond to and are in *pari materia* with the provisions of sections 22 and 23 of the 1950 Act and are more or less in similar terms ".

His Lordship then proceeded to discuss the meaning, scope and effect of these sections. The learned Judge came to the conclusion that under the terms of section 33-A and section 23 of the 1950 Act the authority referred to in these sections would have jurisdiction to do complete justice between the parties relating to the matters in dispute and would have power to give such relief as the nature of the case might require and not merely to adjudicate upon whether the employer had not been guilty of contravention of section 33 (section 22 of 1950 Act). His Lordship then proceeded to consider the submission of the counsel for the workers that

1. (1955) S.C.J. 253 : (1955) 1 M.L.J. (S.C.) 148 : (1955) 1 S.C.R. 1241 (S.C.).

the scope of section 33 of the 1947 Act and of section 22 of the 1950 Act was precisely the same as that of section 33-A and section 23. After setting out the arguments of counsel His Lordship stated :

" The object of section 22 of 1950 Act like that of section 33 of the 1947 Act as amended is to protect the workmen concerned in disputes which form the subject-matter of pending proceedings against victimisation by the employer on account of their having raised industrial disputes or their continuing the pending proceedings. It is further the object of the two sections to ensure that proceedings in connection with industrial disputes already pending should be brought to a termination in a peaceful atmosphere and that no employer should during the pendency of these proceedings take any action of the kind mentioned in the sections which may give rise to fresh disputes likely to further exacerbate already strained relation between the employer and the workmen. To achieve this object a ban has been imposed upon the ordinary right which the employer has under the ordinary law governing a contract of employment. Section 22 of the 1950 Act and section 33 of the 1947 Act which impose the ban also provide for the removal of that ban by the granting of express permission in writing in appropriate cases by the authority mentioned therein ; the purpose of these two sections being to determine whether the ban should be removed or not, all that is required of the authority exercising jurisdiction under these sections is to accord or withhold permission. And so it has been held we think rightly—by the Labour Appellate Tribunal in *Carlsbad Mineral Water Mfg. Co., Ltd.* v. *Their Workmen*[1], which was a case under section 33 of the 1947 Act. Even a cursory perusal of section 33 of the 1947 Act will make it clear that the purpose of that section was not to confer any general power of adjudication of disputes......Further if the purpose of the section was to invest all the authorities named therein with power to decide industrial disputes one would have expected some provision enabling them to make and submit an award to which the provisions of the Act would apply such as is provided in section 33-A of the 1947 Act or section 23 of the 1950 Act. There is no machinery provided in section 33 of the 1947 Act or section 23 of the 1950 Act for enforcing the decision of the authority named in those sections. This also indicates that those sections only impose a ban on the right of the employer and the only thing that the authority is called upon to do is to grant or withhold the permission, that is to lift or maintain the ban........Imposition of conditions is wholly collateral to this purpose and the authority cannot impose any condition...........In our judgment the Labour Appellate Tribunal was in error in holding that it had jurisdiction to impose conditions as a pre-requisite for granting permission to the company to retrench its workmen ".

This matter received further consideration at the hands of the Supreme Court in *Lakshmi Devi Sugar Mills* v. *Ram Sarup*[2]. Bhagwati, J., who delivered the judgment of the Court referring to the scope of the enquiry before the Labour Appellate Tribunal under section 22 said :

" Tribunal before whom an application is made under that section has not to adjudicate upon any industrial dispute arising between the employer and the workman but has only got to consider whether the ban which is imposed on the employer in the matter of altering the conditions of employment to the prejudice of the workman or his discharge or punishment whether by dismissal or otherwise during the pendency of the proceedings therein referred to, should be lifted. A *prima facie* case has to be made out by the employer for the lifting of such ban and the only jurisdiction which the Tribunal has is either to give such permission or to refuse it provided the employer is not acting *mala fide* or is not resorting to any unfair practice or victimisation. It cannot impose any conditions on the employer before such permission is granted ; nor can it substitute another prayer for the one which the employer has set out in his application. If the permission is granted the ban would be lifted and the employer would be at liberty, if he so chooses thereafter, to deal out the punishment to the workman. On such action being taken by the employer the workman would be entitled to raise an industrial dispute which would have to be referred to the appropriate Tribunal for adjudication by the Government on proper steps being taken in that behalf. When such industrial dispute comes to be adjudicated upon by the appropriate Tribunal the workman would be entitled to have all the circumstances of the case scrutinised by the Tribunal and would be entitled to get the appropriate relief at the hands of the tribunal—The tribunal before whom such an application for permission is made under section 22 of the Act would not be entitled to sit in judgment on the action of the employer if it once came to the conclusion that a *prima facie* case had been made out for dealing out the punishment to the workman. It would not be concerned with the measure of the punishment nor with the harshness or otherwise of the action proposed to be taken by the employer except perhaps to the extent that it might bear on the question whether the action of the management was *bona fide* or was actuated by the motive of victimisation. If on the materials before it the Tribunal came to the conclusion that a fair enquiry was held by the management in the circumstances of the case and it had *bona fide* come to the conclusion that the workman was guilty of misconduct with which he had been charged a *prima facie* case would be made out by the employer and the Tribunal would under these circumstances be bound to give the requisite permission to the employer to deal out the punishment to the workman. If the punishment was harsh or excessive or was not such as should be dealt out by the employer having regard to all the circumstances of the case the dealing out of such punishment by the employer to the workman after such permission was granted would be the subject-matter of an industrial dispute to be raised by the workman and to be dealt with as aforesaid. The Tribunal, however, would have no jurisdiction to go into that question and the only function of the Tribunal under section 22 of the Act would be either to grant the permission or to refuse it ".

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1. (1953) 1 L.L.J. 85.
2. (1957) S.C.J. 46 (S.C.).

His Lordship then proceeded to say that there was a fair enquiry into the misconduct of the workman by the management and that the latter's action was *bona fide* and that the Labour Appellate Tribunal ought to have held that a *prima facie* case for the dismissal of the workman had been made out by the appellant and ought to have granted the appellant the permission to dismiss the workman.

The result of these decisions might thus be summarised :—

Where an employer applies for permission to punish his workman be it under section 22 or section 33, the Tribunal is concerned with two matters :—

(i) Is the act of the employer *bona fide* or is it intended to victimise the workmen for their act in raising the dispute or in continuing it? If this was answered against the employer the permission would be refused.

(ii) Was there *prima facie* misconduct on the part of the workmen justifying the employer in inflicting the punishment? If the answer was in the affirmative the quantum of punishment was left to the employer.

If the punishment which the employer inflicted was unduly harsh or was not justified by the facts and circumstances of the case, an industrial dispute could arise which might be subject to adjudication on reference by the appropriate Government under section 10 to the Tribunal. In view of the later decisions of the Supreme Court a dispute raised between an individual workman and his employer, would not *per se* amount to an industrial dispute but might fall into the category if the other workmen made it an issue between the workmen as a body and their employer. Vide *Newspapers, Ltd.* v. *State Industrial Tribunal*[1].

The Industrial Tribunal, Madras, in its orders now impugned in these proceedings has understood the law in the same manner as set out above but it has held that the amending Act of 1956 has brought about a fundamental change and that under the amended sections the Tribunal is clothed with powers to decide an industrial dispute and impose conditions subject to which permission or approval could be granted.

I shall now proceed to set out the section as amended by the Act XXXVI of 1956—The Industrial Disputes (Amendment and Miscellaneous Provisions) Act, 1956, which repealed the Industrial Disputes Act, 1950, and introduced by its section 21, a new section 33 which is in these terms :—

Section 33 (1).—*Conditions of service, etc., to remain unchanged under certain circumstances during pendency of proceedings* :—During the pendency of any conciliation proceeding before a Conciliation Officer or a board or of any proceedings before a Labour Court or Tribunal or National Tribunal in respect of an industrial dispute no employer shall,—

(*a*) in regard to any matter connected with the dispute alter to the prejudice of the workmen concerned in such dispute, the conditions of service applicable to them immediately before the commencement of such proceeding or

(*b*) for any misconduct connected with the dispute, discharge or punish whether by dismissal or otherwise, any workman concerned in such dispute, save with the express permission in writing of the authority before which the proceeding is pending :

(2) During the pendency of any such proceeding in respect of an industrial dispute the employer may, in accordance with the standing orders applicable to a workman concerned in such dispute,

(*a*) alter, in regard to any matter not connected with the dispute the conditions of service applicable to that workman immediately before the commencement of such proceeding ; or

(*b*) for any misconduct not connected with the dispute, discharge or punish whether by dismissal or otherwise, that workman :

Provided that no such workman shall be discharged or dismissed unless he has been paid wages for one month and an application had been made by the employer to the authority before which the proceeding is pending for approval of the action taken by the employer.

(3) Notwithstanding anything contained in sub-section (2) no employer shall, during the pendency of any such proceeding in respect of an industrial dispute take any action against any protected workman concerned in such dispute :—

1. (1957) S.C.J. 566 : (1957) M.L.J. (Crl.) 540 : A.I.R. 1957 S.C. 532 (S.C.).

(a) by altering, to the prejudice of such protected workman, the conditions of service applicable to him immediately before the commencement of such proceedings ; or

(b) by discharging or punishing whether by dismissal or otherwise such protected workman, save with the express permission in writing of the authority before which the proceeding is pending.

Explanation.—For the purposes of this sub-section a 'protected workman' in relation to an establishment, means a workman who, being an officer of a registered trade union connected with the establishment, is recognised as such in accordance with rules made in this behalf.

(4) In every establishment the number of workmen to be recognised as protected workmen for the purposes of sub-section (3) shall be one per cent. of the total number of workmen employed therein subject to a minimum number of five protected workmen and a maximum number of one hundred protected workmen and for the aforesaid purpose, the appropriate Government may make rules providing for the distribution of such protected workmen among various trade unions, if any, connected with the establishment and the manner in which the workmen may be chosen and recognised as protected workmen.

(5) Where an employer makes an application to a Conciliation Officer, Board, Labour Court Tribunal or National Tribunal under the proviso to sub-section (2) for approval of the action taken by him, the authority concerned shall, without delay, hear such application and pass, as expeditiously as possible, such order in relation thereto as it deems fit".

The question which I have now to consider is as to the nature and the effect of the changes, if any, introduced by the Amending Act of 1956.

I shall now briefly summarise the changes which have taken place from 1947 up-to-date. The two main heads under which the action of the employer is calculated to disturb a proper adjudication of the industrial dispute have been,

(i) prejudicial alteration in the conditions of service of workmen and (ii) punishments of workmen concerned in the dispute during its pendency. Under the Act as enacted in 1947, section 33 laid an absolute embargo on the employers prejudicially altering the conditions of service of their workmen. In regard to punishments of the workmen for misconduct the 1947 Act drew a distinction between misconduct connected with the dispute and that unconnected with the dispute. In regard to the former the management had to obtain express permission in writing of the tribunal or authority before which the dispute was pending while in regard to the latter, namely, where misconduct was unconnected with the dispute the plenary power of the employer to proceed to exercise his Common Law powers was left unaffected. These underwent modification by the Amending Act of 1950 which effected alteration in both the above heads. The complete ban imposed by the 1947 Act on prejudicial alterations of the conditions of service of the workman was modified by making alterations possible with the permission in writing of the Tribunal, etc. In regard to the other head the distinction drawn between misconduct connected and misconduct unconnected with the dispute was dropped and the permission of the Tribunal had to be obtained before any workman was punished by the employer during the pendency of the dispute. The changes effected by the 1956 Act indicate something like a mixture of the positions as they stood in 1947 and in 1950. A broad line of distinction was drawn between matters connected with the dispute and unconnected with the dispute, pending before the Tribunal. Prejudicial alteration of service was placed on the same footing as disciplinary action against the workmen for their misconduct. The result of this combination is to be found in sub-sections (1) and (2) of section 33 as now amended. Section 33 (1) is concerned with the state of affairs where prejudicial alterations of conditions of service or misconduct of workmen are connected with the dispute. In both these cases the previous permission in writing of the Tribunal has to be obtained before the employer takes action. Where these are unrelated to the subject-matter of the dispute before the Tribunal they are dealt with in sub-section (2). Here the employer is given freedom of action but subject to his action meeting with the approval of the Tribunal. Sub-section (3) is concerned with protected workmen, a category introduced for the first time in Indian Labour Legislations but this has little relevance in the present context and might therefore be omitted out of consideration, beyond noting that in their case also the previous permission in writing of the Tribunal has to be obtained before action is taken by the employer. Lastly we have sub-section (5) which uses the expression "as it deems fit" to describe the order which the Tribunal could pass

and the introduction of this phrase in the 1955 Act, is one of the reasons assigned by the learned Judge who constituted the Tribunal for holding that the amendment has made a basic departure from the content of section 33 as it stood in the Act of 1950.

This will be a convenient stage at which to set out the reasoning on the basis of which the Tribunal held that the decisions of the Supreme Court from which I have quoted relevant passages, do not apply to the construction of section 33 (2) as it now stands. The first is that the amended section 33 (2) used the expression "approval" in contradistinction to the "express permission" in writing which occurred in section 22 of the Labour Appellate Tribunal's Act, 1950 and section 33 as it stood before the recent amendment as also in section 33 (1) and section 33 (3) in the Act as it now stands. It is a matter of concession that where the employer applied for permission of the Tribunal under section 33 (1) and section 33 (3) before the amendments of 1956, the jurisdiction of the Tribunal extended only to considering whether the action of the employer was *bona fide*, that is, not an act of victimisation or intended to or calculated to effect a "queering of the pitch" in regard to the proceedings before the Tribunal for the adjudication of the industrial dispute pending before it. Harshness or excessiveness of the punishment proposed to be inflicted by the employer might be a factor for judging his *bona fides*, understood in the sense above indicated, but if the Tribunal reached a finding that the action of the employer was *bona fide*, it retained no power to direct any variation in the punishment or to impose conditions subject to which alone the punishment should be inflicted. If this were so in a case where the matter on which permission was sought was undoubtedly connected with the dispute before the tribunal, it would indeed be a matter of some surprise that in a case where the matter was unrelated to the dispute the Tribunal's jurisdiction was more extensive, which meant that the employer's powers were in such a case more restricted.

In both the cases which are the subject-matter of these two petitions the Tribunal has recorded findings that the employer was not actuated by any *mala fides* in taking action against the workmen. The Tribunal, however, proceeded to hold that it had jurisdiction to alter the punishment inflicted by the employer on the ground that it was excessive. As already stated power was vested on two bases, firstly, that section 33 (2) used the word "approval" instead of the word "permission" used in sub-section (1) and secondly the jurisdiction of the Tribunal was referred to as one to pass an order "as it deemed fit" in sub-section (5). With due respect to the learned Judge who constituted the Tribunal I am unable to agree with this view.

The learned Advocate-General submitted that the expression "approval" has been used in sub-section (2) merely because the employer had already taken action and that consequently the word 'permission' would have been inappropriate in that context. He also urged that the words used in sub-section (5) 'as it might think fit' do not mean that it might pass any order that it liked but that the only order which it could pass would be either to approve or not to approve the action taken by the employer which it had to decide on principles similar to those applicable to the grant of permission under sub-section (1) as construed by the Supreme Court in the decisions referred to already. In my judgment these submissions of the learned Advocate-General are well-founded. The reasoning of the Tribunal amounts to saying that in the case covered by sub-section (2) the jurisdiction of the Tribunal had to be exercised on the same principles as those applicable to an industrial dispute.

The reasoning contained in the judgments of the Supreme Court in the decisions referred to above appear to me to apply with equal force to the construction of section 33 as it now stands. The broad distinction between the powers of a Tribunal in dealing with industrial disputes and when exercising jurisdiction to grant permission still prevails and there is in this connection no material difference between the powers of the Tribunal under the three sub-sections of section 33.

The jurisdiction of the Tribunal under section 33 (1), (2) or (3) is still not to decide an industrial dispute but to keep the ring clear by preventing either side

from disturbing the equilibrium. Section 33-A still continues in the same form as before and the distinction between its provisions, where the Tribunal is enjoined to decide the complaint as if it were an industrial dispute and those in section 33 still serves to underline and emphasise the contrast between the scope of the two sections 33 and 33-A which underlies the reasoning of the Supreme Court in the passages extracted. In line with the above, an order under section 33-A results in an award—which is to be dealt with as other awards—and we do not have any such provision in regard to the orders under section 33.

Section 33-A constitutes a departure from the general principle that industrial disputes are brought up before Tribunals for adjudication only on reference by the appropriate Governments. In the case of complaints under section 33-A, an exception is made to this rule and the Tribunal is directed in express terms to deal with it " as if it were an industrial dispute ". Parliament had before it the language of section 33-A which had been construed in the manner indicated by the Supreme Court, when section 33 was amended in 1956. Parliament, however, did not choose to employ that language but chose to confer upon the Tribunal only the power to " approve ". This, in my opinion, is an indication that the distinction under the class of power vested in the Tribunal under section 33-A and that under section 33 still remains. The scheme of the Industrial Disputes Act is for industrial disputes being referred to appropriate authorities or Tribunals by appropriate Governments. Section 33 (2) cannot be construed in a manner which would run counter to this basic rule except, on very strong grounds and in the absence of any express language as is to be found in section 33-A, I am unable to hold that an inroad was, so to speak, made in section 10 (1) (*c*) by section 33 (2).

Again the Supreme Court pointed out that if an employer took action against his workman in pursuance of the permission granted to him, its propriety or harshness in relation to the facts and circumstances attending the misconduct, might possibly be raised as an industrial dispute if the body of workmen made it an issue and it was only then and in that manner that the quantum of punishment would come up for adjudication before the Industrial Tribunal. There is no provision in the Act of 1956 rendering the approval of the Tribunal final, a finality which could preclude the workmen thereafter complaining of undue harshness or the inappropriateness of the punishment in an industrial dispute if one such should subsequently arise. In making these observations I have in mind cases where the Tribunal accords unconditional approval to an action of the management. Even in such a case it appears to me, that on the decisions of the Supreme Court, the action of the employer could be challenged by the matter being raised in an industrial dispute provided, it arises and is referred to by the appropriate Government to a Tribunal. If the approval of the Tribunal imparted a finality to the action of the employer precluding the arising of an industrial dispute thereafter one would have expected words in the section to achieve this result. In their absence, therefore, one feels entitled to conclude that the propriety of the action of the employer might still be impugned or attacked even after the approval of the Tribunal.

From the passages I have extracted from the judgments of the Supreme Court particularly the passage in the judgment of Bhagwati, J., in *Lakshmi Devi Sugar Mills* v. *Ram Sarup*[1], it would be apparent that the scope of the power to grant permission is confined to saying 'yes' or 'no'. The Tribunal, the Supreme Court has held had power merely to grant or refuse permission and not to impose conditions subject to which alone permission would be granted. It is needless to repeat the criteria laid down by the Supreme Court to be satisfied before the Tribunal could withhold permission. The expression used, 'approved' in section 33 now under consideration has, in my opinion, to be construed similarly. The power of the Tribunal is to "approve" or "not to approve" the action of the employer and it does not extend to its adding conditions to its approval.

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1. (1957) S.C.J. 46.

In my judgment this construction is strengthened and reinforced by reason of the provision in sub-section (2) (*a*) under which prejudicial alteration in the conditions of service of the employees in respect of matters unconnected with the dispute is also made subject to the approval of the Tribunal. In that case at least the approval cannot be conditional. The Tribunal can either approve the alteration or refuse to approve. It cannot be contended that the Tribunal, in the case of clause (*a*) had power to suggest a course of action which the employer was bound to follow. This, in my opinion, throws light on the scope of the power of the Tribunal under sub-clause (*b*) also.

In the light of these considerations I have reached the conclusion that the power of the Tribunal under section 33(2) is of the same type and nature as under section 33 (1) or section 33 (3) as interpreted by the Supreme Court, and that the different expressions "approval" used in sub-section (2) or the words "as it deems fit" in sub-section (5) do not affect any change in the scope of this power. When once the Tribunal negatived *mala fides* on the part of the employer or any intention to victimise the worker for his participation in the industrial dispute, the Tribunal is in my judgment bound to accord its approval to the action of the employer, leaving the propriety of the quantum of punishment for being agitated in other appropriate proceedings open under the Industrial Disputes Act.

I shall now refer to the facts in W.P. No. 597 of 1957. The employee (respondent) absented himself without leave from 27th March, 1957, till 19th April, 1957. He was called upon to offer his explanation for this action and when the management found that his explanation was unacceptable they framed charges against him for habitual absence without leave and after notice to him to show cause why he should not be punished held an enquiry as a result of which the management held that the misconduct of the workman justified their discharging him from service. The management, thereupon, applied to the Tribunal for approval of their action under section 33 (2) (*b*) of the 1956 Act. This application was numbered as Petition No. 3 of 1957 before the Tribunal and the Tribunal did not find that the action of the management was *mala fide* or that it amounted to an act of victimisation but from its judgment it appears that it was satisfied about the *bona fides* of the management but the Tribunal, however, proceeded to hold that the management could have taken a more sympathetic view of his case instead of inflicting the extreme punishment of discharging the respondent from service and it added :

> " I think that in the circumstances of the case it will be enough if his absence is treated as leave on loss of pay. This application is accordingly ordered and the approval prayed for its granted subject to the condition that the discharge order is commuted into leave on loss of pay for the period of absence. He will be permitted to join duty forthwith."

In the view which I have expressed about the scope of the power of the Tribunals under section 33 (2) (*b*), I am of the opinion that the condition imposed was not justified by the terms of the power conferred upon the Tribunal.

Mr. Mohan Kumaramangalam, learned counsel for the workmen-respondents, urged that even assuming that the Tribunal was wrong in the construction of sections 33 (2) and 33 (5) it would merely be a case of erroneous decision which would not be interfered with by this Court under Article 226 of the Constitution. In this connection, learned counsel contended that as the Tribunal was specifically vested with jurisdiction to deal with petitions under section 33 the fact that it passed an erroneous order, that is, assuming that the order was erroneous did not affect jurisdiction over the matter, with the consequence that unless this Court was satisfied that on the merits that order was unjust it should not interfere. I feel I cannot accede to this contention. The Industrial Tribunal is a creation of a statute which has vested it with limited jurisdiction. Where such Tribunal transgresses the limits of its jurisdiction and passes an order which it had no jurisdiction to pass I consider that the aggrieved party has a right to approach this Court to set aside that order under Article 226 of the Constitution. In my opinion, the order now impugned would, on the above classification, be either an order which the Tribunal had no jurisdiction to pass or one in regard to which it assumed jurisdiction by reason of an error apparent on the face of the record, namely, by an erroneous construction of the

statute. Viewed in this light the jurisdiction of this Court to issue the writ of *certiorari* would appear to be beyond question.

The next contention urged by the learned counsel for the respondents in each of the two petitions was that as a learned Judge of this Court had been constituted the Industrial Tribunal it was virtually an order of a Judge of this Court, that was being canvassed and, therefore, this Court had no power to interfere with such orders under Article 226 of the Constitution. This contention, however, is concluded against the learned counsel by a decision of a Full Bench of this Court in In re *Hayles*[1]. As the decision of the Full Bench is binding on me I did not hear any argument from counsel and indeed learned counsel himself stated that he raised the point before me merely in order to agitate it in a place where the correctness of the Full Bench decision could be challenged. Even apart from this Full Bench decision, I might refer to a decision of the Divisional Court in *Queen* v. *Appeal Tribunal, The Champion Paper Fibre Co.*[2], where Lord Goddard, C.J., held that the High Court in England had jurisdiction to issue writ of *certiorari* and to call for the records of an order passed by Justice Lloyd Jacob, when that learned Judge was acting in his capacity as the Patents Appeal Tribunal. I have, therefore, no hesitation in overruling this contention regarding the jurisdiction of this Court under Article 226 of the Constitution.

The result is that these two writ petitions are allowed, the rule is made absolute and the order of the Tribunal imposing conditions is set aside. There will be no order as to costs.

R.M. ——— *Petitions allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE BASHEER AHMED SAYEED AND MR. JUSTICE SUBRAHMANYAM.

G. P. Venkataraman & Co., by its partner Venkataswami .. *Appellant**

v.

Eastern Railways by General Manager, Calcutta and another.. *Respondents.*

Railways Act (IX of 1890), sections 55 and 56 and condition 10 of the forwarding note—Right of Railway Management to sell the goods consigned—When can be exercised—Duty to give notice—If can be contracted out of—Suit for damages for conversion—Limitation for—Limitation Act (IX of 1908), Articles 31, 36 and 48.

A Railway Administration has a right to sell the goods consigned to them for carriage only in accordance with the provisions of the law authorising them in that behalf. Any sale of the goods delivered to them contrary to the provisions of the statute will be without legal authority and wrongful and the Railway will be guilty of conversion. It is not open to the Railway to contract itself out of the statutory obligations.

Where the goods consigned remain unclaimed and the owner of the goods is known the Railway is under a statutory duty to give the notice required by section 56 (1) of the Railways Act before exercising their right of sale. The right to sell will accrue to them only when such a notice is given. Any sale in contravention of the provisions of the section will be invalid. The procedure to be followed in regard to the sale is laid down under section 55 (2) of the Act. The fact that the Railway is authorised, under section 55 or condition 10 of the forwarding note, in certain cases to sell the goods in their custody for non-payment of charges does not mean that the railway is at liberty to sell the goods of a consignor without any notice to him merely because the goods are likely to get deteriorated. In cases of perishables a sale without notice might be justified only if the right to sell has accrued under section 56 of the Act.

A suit for damages for wrongful conversion will be governed by Article 31 of the Limitation Act and not Article 48.

Quaere—Whether Article 36 can apply ?

Sundarji v. *Secretary of State*, A.I.R. 1934 Pat. 507, differed.

Venkatasubba Rao v. *The Asiatic Steam Navigation Co., Calcutta*, (1915) 29 M.L.J. 342 : I.L.R. 39 Mad. 1 (F.B.), referred to.

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1. (1955) 1 M.L.J. 375 (F.B.). 2. (1956) R.P.C. 323.

* Appeal No. 957 of 1953. 30th October, 1957.

Appeal against the decree of the Court of the Subordinate Judge of Coimbatore, in O.S. No. 370 of 1950.

V. C. Gopalaratnam and *L. V. Krishnaswami Ayyar*, for Appellant.

S. S. Ramachandra Ayyar, for Respondents.

The Judgment of the Court was delivered by

Subrahmanyam, J.—The plaintiff appeals from the judgment and decree of the learned Second Additional Subordinate Judge of Coimbatore in O.S. No. 370 of 1950 on his file. The plaintiff is a firm doing business in potatoes and other commodities in Coimbatore. The firm booked on 3rd August, 1948, at Coimbatore, 370 bags of potatoes. The consignor is described as G. P. Venkataraman & Co. The consignment was booked to " Self ". The person who signed the forwarding note is the partner of the firm, Venkataswami, who later instituted the suit which has given rise to this appeal. The consignment reached Shalimar (Calcutta) on the 19th August, 1948. The wagon was placed in position for delivery on 20th August, 1948. The articles were unloaded on 21st August, 1948. As no person claimed delivery till 25th August, 1948, the potatoes were sold by public auction by the Station authorities at Shalimar on 25th August, 1948, and a sum of Rs.2,910 was realised by the sale. The articles were delivered over to the purchaser at the auction N. C. Sinha & Bros. On 27th August, 1948, Venkataswami, the partner of the plaintiff firm, who had booked the consignment happened to be at Calcutta and he went to the Shalimar Goods Yard intending to take delivery. To his great surprise, he learnt that the goods had been sold to N. C. Sinha & Bros. for Rs.2,910-4-0 on account of the omission of the consignee to take delivery in time.

The suit out of which this appeal arises was instituted by the plaintiff to recover the value of the goods, deducting the freight and the charges payable to the railways. The defendants are the railways which received the goods, through whose system the goods passed to Shalimar and the Eastern Railway which owns the railway system at Shalimar.

The plaintiffs claim is based on wrongful sale or conversion, to give the act its technical name. The plaintiff alleges that the defendants had no authority under the Indian Railways Act to sell the potatoes on 25th August, 1948, that, by wrongfully selling the potatoes on the date, they were guilty of conversion and that the plaintiff suffered loss to the extent of the difference between the market value of the goods at Calcutta on that date and the freight and other charges payable to the defendants.

The defence to the suit was that the sale was legal and proper. The defendants pleaded that they were not bound in law or under the Tariff Rules or under the conditions of booking, to intimate the parties of the arrival of the goods at the destination ; that since the goods were perishing, they had to be disposed of in public auction held in accordance with section 56 of the Indian Railways Act after due and proper notifications prior to the auction, that accordingly the goods were sold and that the plaintiff had no cause of action. The defendants also pleaded that they acted in the best interests of the parties after waiting for a reasonable time before disposal of the goods in public auction. A further plea was taken that the suit was not in time.

The learned Subordinate Judge found that the sale was legal and proper and that the suit was barred by time. The goods were placed in position for delivery on 20th August, 1948 and could have been delivered that day. The sale was on 25th August, 1948 and the suit was instituted on the 14th September, 1950. The Subordinate Judge held that Article 31 of the Limitation Act, which allowed a year from the date when the goods ought to have been delivered, applied.

The first point for determination is whether the sale of the goods affected by the Eastern Railway on 25th August, 1948, was lawful and proper. During the trial, an attempt was made to prove that the Railways did all they could to give

due intimation to the plaintiff that the goods were ready for delivery at the Shalimar station. D. W. 2 was the message clerk in 1948 at Shalimar. He produced copies of messages sent from the Station Superintendent, Shalimar, to the Station-master, Coimbatore, on the 21st August and the 23rd August, 1948, in relation to the potatoes which were ready for delivery at the Shalimar Goods Yard. The messages are Exhibits B-11 and B-12 respectively. Exhibit B-11 gives intimation to the Station-master, Coimbatore, that the bags had been received but that in regard to 20 bags the contents were found rotten and scattered on the wagon-floor and that bad smell was emanating. The message Exhibit B-12 states that the contents were going bad, that a reply regarding the consignee's address was necessary, that the goods were lying undelivered and that because the contents were getting rotten, instructions regarding disposal were required. We may presume that the messages were duly received at Coimbatore on the 21st and 23rd August respectively. No evidence is adduced of any attempt on the part of the Railway authorities at Coimbatore to pass on the intimation to the plaintiff firm or Venkataswami, the person who consigned the goods and obtain the plaintiff's or Venkataswami's instructions regarding the disposal of the goods. There can be little doubt that if either the plaintiff or Venkataswami had received the intimation that the goods were lying at Shalimar, that part of the goods had already become unfit for sale or consumption and that the rest of the goods might get rotten if not taken delivery of in a few days, the plaintiff firm would have given instructions to their agent at Shalimar, (or to the Bank to whom they had endorsed the railway receipt), to make immediate arrangements for taking delivery. The plaintiff remaining in the dark as to what was happening to the goods at Shalimar, the Railway authorities proceeded to sell the goods. There is no evidence that the Station Superintendent at Shalimar received any reply from Coimbatore to the messages which had been sent on the 21st and 23rd August. The sale, thus, was a sale effected without intimation of any kind to the consignor or the consignee, that, in default of delivery being taken within a reasonable time, the goods would be sold by public auction. The point for determination is whether the sale held without such intimation or notice to the owner or the consignee is a sale which is authorised by the Indian Railways Act.

Section 56 of the Indian Railways Act and condition No. 10 of the conditions printed on the forwarding note—the condition is extracted at page 13 of the Subordinate Judge's judgment—were relied on as authorising the railway authorities to effect a sale by public auction without notice or intimation of any kind to the owner or other person appearing to the Railway Administration to be entitled to the delivery of the goods. It is on the basis of condition No. 10 that paragraph 4 of the written statement of the third defendant pleaded that the defendants were not bound either in law or under the Tariff Rules to intimate to the parties the arrival of the goods at the destination. The defendants appear to be under a serious misapprehension as to the limits of what they might claim or do without giving notice of the arrival of the goods. In order that demurrage or wharfage charges might accrue due or be demanded, it is not necessary that intimation of the arrival of the goods should be sent to the owner or other person entitled to delivery of the goods. It is to that non-liability of the Railway Administration to give prior notice so as to be entitled to collect demurrage or wharfage charges that condition No. 10 refers or can properly refer. So far as the intimation required by section 56 (1) of the Indian Railways Act is concerned, that is an intimation which the Railway Administration is under an obligation to give. The Railway Administration cannot contract itself out of that obligation by agreement with the consignor. The intimation required under section 56 (1) relates to a right which is totally different from the right of the railway to collect wharfage and demurrage charges. The intimation required under section 56 (1) relates to accrual to the Railway Administration of the right to sell. In order that they might be entitled to sell the property of which they are in possession on behalf of the owner or consignee they have to cause a notice to be served on him requiring him to remove the goods. That obligation arises where the owner or other person entitled to remove the goods is

known. The learned advocate for the respondents-railways said at one stage of his arguments that the owner was not known to the Railway Administration in this particular case. He quite fairly abandoned that contention after looking into Exhibit B-1 and B-2 and after further consideration of the evidence of D.W. 6. D.W. 6, the booking clerk, who without intending to do so, adopted the language of section 56 (1) said "I know the plaintiff's firm". Where the owner is known, section 56 (1) says that the Railway Administration shall cause a notice to be served on him. Exhibits B-1 and B-2, the forwarding note and the risk note, give the address of Venkataswami as clearly as was necessary to enable the railway authorities in Coimbatore to serve notice on him as soon as they received the messages Exhibits B-11 and B-12. Where the owner is known, section 56 (2) authorises sale only in cases where notice could not be served on the owner or where he does not comply with the requisition in the notice. Since no attempt was made in this case, to serve the owner, no question of any failure to comply with the requisition could arise. The Railway Administration did not, on the facts of this case, have a right to sell the goods on 25th August, 1948.

To make this part of the judgment complete, it may be useful to refer to section 55 (2) on which the learned Subordinate Judge relied in support of his finding that the sale was lawful, and which the learned advocate for the respondents too relied on during his arguments. Section 55 deals with cases of sale by the Railway Administration where freight, demurrage, wharfage charges and the like, which the Railway Administration is entitled to demand, are not paid. Section 55 (1) authorises the Railway Administration in such cases, that is, where the charges legally due are demanded and are not paid, to detain the goods. Where the charges are not paid and the goods are detained, section 55(2) confers on the Railway Administration the right to sell the goods. Where the right to sell the goods has thus accrued, section 55 (2) prescribes the procedure to be adopted in conducting the sale. If the goods are perishable they may be sold at once. If they are not perishable they may be sold after notice of the auction is given in the manner prescribed in that sub-section. Section 56 (2) makes the method of sale prescribed by section 55 (2) applicable where the right to sell has accrued to the Railway Administration under section 56 (1) and 56 (2).

The right to sell may accrue either under section 55 (1) by reason of the failure to pay, the demurrage, wharfage or other charges due to the Railway Administration, or under section 56 (1) and 56 (2) if after being given notice of the arrival of the goods, the owner or other person entitled to the goods does not claim delivery, and the goods become unclaimed goods. Where the right to sell has thus accrued, the sale has to be held in accordance with the procedure prescribed by section 55 (2), that is to say, the sale may be held at once if the goods are perishable, or it may be held after due notice of auction, if they are not perishable. There is no contention in this case that due notice of auction under section 55 (2) has not been given. We may presume that in conducting the sale the proper procedure was adopted. But the right to sell had not accrued and for that reason, the sale was void as against the plaintiff. In thus selling the plaintiff's goods without legal authority, the defendants were in law guilty of conversion. For the purposes of this case, it is not necessary to define conversion beyond quoting the following sentence from Salmond on Torts, (11th Edition, page 330).

"Every person is guilty of conversion who, without lawful justification, deprives a person of his goods by delivering them to someone else so as to change the possession".

Since we have found that the defendants deprived the plaintiff of the goods without lawful justification and delivered the goods over to the purchaser at the auction, the defendants were guilty, in the technical sense of the term, of conversion. We find that the sale was wrongful and that, subject to limitation, the plaintiff was entitled to compensation.

The next point for determination is whether the suit is in time. On that point the learned advocate for the appellant states that the article of the Limitation Act

applicable is Article 48 and not Article 31 which the learned Subordinate Judge applied. Article 48 is in these terms :—

"For specific movable property lost, or acquired by theft, or dishonest misappropriation or conversion, or for compensation for wrongfully taking or detaining the same.	Three years from the date when the person having the right to the possession of the property first learns in whose possession it is."

Looking at that article independently of the authorities relied on, this suit is not clearly within the language of that article. The plaintiff does not sue for specific movable property lost or acquired by theft, or dishonest misappropriation or conversion. The suit was instituted in 1950. Even if the potatoes had not been sold, they would be of no use in 1950 to the plaintiff or anybody else and it is altogether out of the question that anybody in 1950 would sue for the specific movable property which was consigned to the railways in 1948 for carriage to Shalimar. There has of course been "conversion". A person might sue for specific movable property where it has been detained and such detention amounts to conversion, or where the property has been transferred to another, and such act of transfer amounts to conversion. But even where the act alleged is conversion, unless the relief prayed for is possession of the specific movable property, the earlier part of that article will not apply. The latter part of the article would apply where compensation is prayed for wrongfully taking or detaining the same. The goods in this case were taken by the Railway Administration lawfully, on being consigned to them for carriage. On the plaintiff's own allegation, the goods have been disposed of and are not detained. We may note in passing that, if the suit were laid immediately after the sale to Sinha and Bros., and while they were yet capable of being delivered to the plaintiff and the suit were for possession of the goods, then, the suit would be a suit of the kind provided for by section 11 (*d*) of the Specific Relief Act. Under section 11 (*d*) of the Specific Relief Act, a person who is in possession of a particular article of movable property of which he is not the owner, may be compelled specifically to deliver it to the person entitled to its immediate possession when the possession of the thing claimed has been wrongfully transferred from the claimant where conversion of that sort is alleged and on the basis of such cause of action, specific movable property is sought to be recovered, Article 48 of the Limitation Act would directly come into play. Article 48, in our opinion, has no application to a case where possession has been transferred by conversion and the relief claimed is not possession of the specific movable property so transferred but compensation for such conversion. It is true that under Order 20, rule 10, Civil Procedure Code, even where possession of specific movable property is claimed and the Court grants a decree for possession of such property, the Court has to state in its decree the amount of the money to be paid in the event of the failure to deliver the article. Nonetheless the suit remains a suit under section 11 of the Specific Relief Act for specific movable property. We have dealt with this particular point at some length because we do not think that the authority cited to us on the question of the applicability of Article 48 to the facts which have been proved in this case, viz., *Sunderji* v. *Secretary of State*[1], should, speaking with great respect, be followed by us. The facts in that case were : The plaintiff through a firm of colliery proprietors known as Messrs. Villiers, Ltd., ordered certain consignments of coal to be sent to his consumers in different parts of the country. The customers were a firm known as Sikri Brothers of Adampur. Messrs. Villiers, Ltd., made arrangements with the Railway company for the moving of a quantity of coal by the Railway Company to Sikri Brothers, but, owing to some mistake on the part of the plaintiff in directing Messrs. Villiers, Ltd., as to where the coal was to be sent, it was sent to a wrong destination. After some correspondence between the Railways, the plaintiff and Messrs. Villiers, Ltd., it was ultimately arranged that the goods might be delivered to a trader at the station to which they had been wrongly sent. But that particular trader would not take delivery unless the railway company remitted the charges for wharfage. The railway company declined to remit the

1. A.I.R. 1934 Pat. 507.

charges for wharfage. The goods were not taken delivery of. The company, acting in exercise of the power conferred on it by section 55(2), of the Indian Railways Act sold the goods by public auction. The plaintiff instituted the suit which gave rise to that Civil Revision Petition in that High Court, claiming compensation. The High Court held that Article 48 applied to the facts of that case. We have given reasons for the view that, even if the facts in the case before us were not distinguishable, from the facts in that case, we would not, with respect, be inclined to follow that ruling. But for our present purposes, it is sufficient to note that, on the facts the case before us is distinguishable from the facts of that case. The question before us is whether the article applicable is, Article 31 or Article 48. But on the facts in *Sunderji's case*[1], nobody could argue that Article 31 might apply. We shall presently state our reasons for that view.

In *Venkatasubba Rao* v. *The Asiatic Steam Navigation Co., Calcutta*[2], one of the questions considered was whether, if a case fell within the language of Article 31 and Article 49, it was Article 31 or Article 49 that should be applied. In that case, the Full Bench held that even if Article 49 applied its operation would be excluded by the provisions of the special Article 31 on the principle *generalia specialibus non derogant*. Therefore, on the question whether, if a case fell within the language of Article 31 and Article 48, the article to be applied would be Article 31 or Article 48, we have the authority of the Full Bench decision in *Venkatasubba Rao* v. *The Asiatic Steam Navigation Co, Calcutta*[2], for the view that Article 31 should be applied and not Article 48. No such question arose in *Sunderji* v. *Secretary of State*[1], because in that case Article 31 could not be applied at all. Article 31 is in these terms :

" Against a carrier for compensation for non-delivery of, or the delay in delivering goods.	One year from the date when goods ought to be delivered."

Sunderji v. *Secretary of State*[1], was not a case of non-delivery by the Railway Administration. The Railway Administration were entitled to wharfage charges and they were not bound to deliver unless those charges were paid. The person entitled to take delivery declined to pay and take delivery. Therefore it was not a case of non-delivery and Article 31 could not be applied. Therefore, in a case which falls under the language of Article 31 and Article 48, *Sunderji* v. *Secretary of State*[1], cannot be regarded as authority for the proposition that Article 48 should be applied and not Article 31. On the other hand, we have the authority of the Full Bench decision in *Venkatasubba Rao* v. *The Asiatic Steam Navigation Company, Calcutta*[2], for the view that, in such a case the article applicable is Article 31. The Full Bench case dealt on the facts, with a case where one of the articles included in the consignment was not traceable. It was not a case of conversion or of the commission of a tort on the part of the Railway Administration. The Full Bench held that, whatever the cause of non-delivery by the carrier the suit for compensation for non-delivery should be held to fall under Article 31. Their Lordships observed :

> " It seems to us that by this amendment (of 1899) the legislature clearly indicated its intention that Article 31 should apply to a claim against a carrier for compensation for non-delivery of goods irrespective of the question, whether the suit was laid in contract or in tort ".

The suit in this case is laid in tort. But the result is non-delivery and in the ultimate analysis, if compensation is allowed, it is allowed not for conversion but for non-delivery. The suit is not, in our opinion, a suit of the nature for which Article 48 provides. The article of the Limitation Act, applicable to the suit is Article 31. The Subordinate Judge was right in finding that the suit was barred by time.

One other article which may be considered in this connection is Article 36 which provides :

"For compensation for any malfeasance, misfeasance or non-feasance independent of contract and not herein specifically provided for.	Two years from the date when the malfeasance, misfeasance, or non-feasance takes place."

1. A.I.R. 1934 Pat. 507.
2. (1915) 29 M.L.J. 342; I.L.R. 39 Mad. 1 (F.B.).

The suit in this case may be regarded as a suit for compensation for misfeasance. Even if that article were applicable, the suit would be beyond time by nearly a month. The question whether, in a case which falls within the language of Articles 31 and 36, the Article to be applied is Article 31 or Article 36 may perhaps deserve consideration in a case in which that question becomes material. But that question is of no practical importance in this case because whether Article 31 is applied or Article 36, the suit is beyond time.

By Exhibit A-8 dated 21st December, 1949, the Railways offered to pay the plaintiff Rs. 1275-13-0 after deducting wharfage and other charges payable from the sale proceeds realised. The offer was made "without prejudice". The plaintiff by Exhibit A-9 dated 16th January, 1950 accepted the offer and said that without prejudice to its right to file a suit for the balance, it would accept Rs. 1275-13-0. But the defendants changed their mind in February, 1950 and wrote to the plaintiff that payment would be arranged only "on receipt of your clear acceptance of the offered amount in full and final settlement of the claim". The plaintiff declined to accept the amount in full satisfaction (Exhibit A-11). By oversight, the learned Subordinate Judge neglected to pass a decree for that sum. We consider that the plaintiff is entitled to interest at 6 per cent. on Rs. 1275-13-0 with effect from 16th January, 1950, the date on which the plaintiff accepted the defendants' offer to pay without prejudice. There will accordingly be a decree against the defendants for payment of Rs. 1275-13-0 with interest at 6 per cent. per annum from 16th January, 1950.

The parties will bear their own costs in both Courts.

R.M. *Appeal allowed in part.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE RAMASWAMI.

Nallasivam Chettiar, minor by next friend Subbiah Chettiar .. *Petitioner**

v.

Avudayamma, minor by father and guardian, Ekambaram Chetti .. *Respondent.*

Practice—Directions given by the High Court (in a pending Second Appeal) to the lower Court to determine the quantum of money to be paid to a claimant—Subsequent disposal of the Second Appeal itself—If takes away the power of the lower Court to determine the quantum.

In a Second Appeal pending before it the High Court passed orders on a Civil Miscellaneous Petition directing the lower Court to determine the quantum of marriage expenses to be provided for one of the defendants out of the joint family funds. During the pendency of the proceedings in the lower Court in pursuance of the aforesaid direction the Second Appeal itself was disposed of finally by the High Court. It was contended that the disposal of the Second Appeal automatically terminates the proceedings before the lower Court commenced in pursuance of the earlier directions of the High Court.

Held, that the lower Court can proceed and complete the enquiry in pursuance of the earlier directions even though the main appeal itself has been disposed of by the High Court. If any party is aggrieved by any order of the lower Court in that behalf it is open to them to file an appeal against the said order treating it as an interim decree or agitate the matter in an appeal against the final decree as the circumstances may require,.

Section 151, Civil Procedure Code, does not enable a party to file an application in the High Court, after the disposal of the Second Appeal, for directions that the lower Court is not competent to proceed with the inquiry in pursuance of the earlier directions.

Bharat Indu. v. *Yakub Hasan*, (1913) I.L.R. 35 All. 150 ; *Basavayya* v. *Guruvayya*, (1951) 2 M.L.J. 176 and *Mukund Lal* v. *Gaya Prasad*, (1935) I.L.R. 57 All 977 (F.B.), referred.

Petition under section 151, Civil Procedure Code praying that in the circumstances stated therein and in the affidavit filed therewith the High Court will be pleased to direct the District Munsif of Tirunelveli to dismiss I.A. No. 231 of 1957 on his file in O.S. No. 182 of 1952 and to give directions to him for passing a final

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* C.M.P. No. 8133 of 1957 in S.A. No. 1056 of 1954. 11th December, 1957.

decree as per preliminary decree passed by the High Court in S.A. No. 1056 of 1954, preferred against the decree of the District Court, Tirunelveli in A.S. No 164 of 1953 (O.S. No. 182 of 1952, District Munsif's Court, Tirunelveli).

T. V. Balakrishnan for *R. Desikachari*, *T. S. Arunachalam*, *Fyzee Mohamad* and *N. K. Panchapakesan*, for Petitioner.

A. Balasubramaniam (Amicus curiae).

K. R. Rama Ayyar, for Respondent.,

The Court made the following

ORDER.—An interesting point is raised in this Civil Miscellaneous Petition.

There was a Second Appeal in this Court disposed of in S.A. No. 1056 of 1954. In this Second Appeal there was a C.M.P—C.M.P. No. 9546 of 1956 in which directions were asked for provision being made for the marriage expenses of the fourth defendant. This petition was disposed of by Ramaswami Gounder, J., by directing the fourth defendant to approach the lower Court for orders as to determining the quantum of the marriage expenses as the learned Judge had no sufficient materials before him to decide the matter. It may be noted here that there was no dispute that the marriage expenses of the fourth defendant constituted a legitimate item of expenditure to be incurred by the joint family. This order of Ramaswami Gounder, J., was on 7th January, 1957 and the aggrieved party thereafter filed I.A. No. 231 of 1957 on 25th February, 1957 in the trial Court. It is now pending and even before this application is adjudicated the plaintiff has come to this Court stating that in as much as the main Second Appeal has been disposed of, by me, the C.M.P. relating to the provision of marriage expenses of the fourth defendant got merged in the Second Appeal and hence the lower Court was not competent to entertain any further application.

I am unable to see any force in this contention. The enquiry in regard to the provision of marriage expenses of the fourth defendant is being held in pursuance of the directions of Ramaswami Gounder, J., in the Civil Miscellaneous Petition mentioned above and the only grievance which can be felt by the plaintiff is that he should not be left without any remedy by way of appeal.

But this is easily met up by the fact that between the preliminary decree and the final decree the lower Court can pass many interim final decrees and this position is made clear by the decisions reported in *Bharat Indu.* v. *Yakub Hasan*[1], and *Basavayya* v. *Guruvayya*[2]. Therefore when the lower Court adjudicates upon this matter it can be treated as an interim final decree it will always be open to the plaintiff to file an appeal against that interim final decree if so advised, or it will be open to the trial Court to take this up as a part of the final decree itself in case there is no urgency and in that case an appeal can be filed against the final decree itself. I need not point out that the marriage of the fourth defendant should not be made dependent upon the passing of final interim decree which may take time covering several extraneous matters. In any event the present petitioner will not be left without any remedy by way of appeal if he is really prejudiced by the orders passed in this interlocutory application.

I may incidentally point out that the powers under section 151 of the Civil Procedure Code cannot be invoked to file C.M.Ps. of this nature here when the Second Appeal itself has been disposed of. This point is concluded by authority viz., *Mukund Lal* v. *Gaya Prasad*[3], following *Atma Ram* v. *Beni Prasad*[4]. This Civil Miscellaneous Petition has got to be dismissed and is hereby dismissed.

Mr. K. R. Rama Iyer, learned counsel points out that the marriage of his client (4th defendant) is imminent and that there should be no further delay in the disposal of I.A. No. 231 of 1957. I endorse this.

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1. (1913) I.L.R. 35 All. 159.
2. (1951) 2 M.L.J. 176.
3. (1935) I.L.R. 57 All. 977 (F.B.).
4. (1934) I.L.R. 56 All. 907.

I must express my acknowledgment to Mr. A. Balasubramaniam whom at an earlier stage I appointed as *amicus curiae* to argue the matter and who has placed all the relevant authorities before me for the proper disposal of this application.

R.M. ——— *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE RAMASWAMI.

V. B. Krishnamurthi .. *Petitioner**

v.

V. B. Krishnanda Mudaliar .. *Respondent.*

Civil Procedure Code (V of 1908), section 151—Inherent powers.

Court-fees—Refund of—Memorandum of appeal with deficit Court-fee—Returned and not re-presented—Appeal becoming unnecessary—Refund of Court-fee paid—When permissible.

Where an appeal which has been registered and numbered is withdrawn as having become unnecessary no refund of Court-fee can be ordered.

Chidambaram Chettiar, In re, (1934) 67 M.L.J. 321 : I.L.R. 57 Mad. 1028 and *Kappini Gounder* In re, (1937) 2 M.L.J. 788, referred.

But where an appeal was presented with a deficit Court-fee and was returned but was not re-presented as having become unnecessary, though no refund of Court-fee could be ordered by Court under the previous Court Fees Act, still the Court could issue a certificate that the appeal was not numbered and direct the appellant to apply to the Revenue Authorities for *ex gratia* refund as in the case of spoiled stamps.

[Policy of the Legislature that refund in such cases is just and equitable as indicated by section 66 (1) of the Madras Court Fees and Suits Valuation Act, 1955, pointed out].

Rachakonda Nagaratnam, In re, (1950) 1 M.L.J. 222, followed.

Petitioner praying that in the circumstances stated therein and in the affidavit filed therewith the High Court will be pleased to order refund of the Court-fees affixed, *viz.*, Rs. 127-7-0 in S.R. No. 8451 of 1955, C.C.C.A. sought to be preferred to the High Court against the decree of the City Civil Court, Madras, dated 10th January, 1955 and passed in O.S. No. 944 of 1952.

T. S. Santhanam, for Petitioner.

The Court made the following

ORDER.—This is an application for refund of Court-fee paid on memorandum of appeal which was not properly stamped and was returned for payment of deficit Court-fee and which the appellant did not re-present as he found no necessity for it.

Refund is asked for under inherent powers.

Two decisions have now to be considered. In *Chidambaram Chettiar*, In re[1], where the appellant in an appeal which had been registered withdrew the appeal as having become unnecessary refund of Court-fee paid on the appeal was held inadmissible. The decision in *Kappini Gounder*, In re[2], refusing refund also related to a case where the appeal was withdrawn long after it was registered and admitted.

In the present case the appeal however has not been registered and taken on file and could not also be registered as it was defective.

The next decision in *Rachakonda Nagaratnam*, In re[3], related to a case where as in this case the appeal was not registered. It was held following an unreported decision in C.M.P. Nos. 4439 to 4442 of 1941 relating to a similar case that refund could not be ordered but a certificate was granted that the appeal was not numbered or heard and that the memorandum of appeal which was directed to be returned to the party was stamped with a Court-fee of Rs. 149-15-0 leaving it to the appellant

* S.R. No. 27517 of 1957. 4th November, 1957.

1. (1934) 67 M.L.J. 321 : I.L.R. 57 Mad. 1028.
2. (1937) 2 M.L.J. 788.
3. (1950) 1 M.L.J. 222.

to apply to the Revenue authorities for an *ex gratia* refund as in the case of spoilt stamp papers.

To my mind this procedure may be followed in this case also. The fact that it is not shown that the non-prosecution of the appeal here is not the result of compromise or settlement as in that case does not make any difference. If anything, refund is less justifiable when the appellant has got something by settlement by using the unfiled appeal as a means to extract some concession. The fact that the Legislature has thought fit to enact a provision of refund in the new Act in such cases indicated that in the opinion of the framers of the law, refund in such cases is just and equitable (*see* section 66 (1) of the New Court Fees Act).

Therefore grant a certificate on the same lines as in *Raahakonda Nagaratnam, In re*[1].

R.M. ——— *Certificate directed to be granted.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE PANCHAPAKESA AYYAR AND MR. JUSTICE GANAPATIA PILLAI.

Thangalakshmi Ammal .. *Appellant**

v.

Arunachalam and others .. *Respondents.*

Elections—Municipal Elections—Tribunals under—Power to allow further particulars.

Though an Election Tribunal created under the law relating to Elections has no inherent or Common Law powers, like a Court of law or equity and though there is no express statutory provision in such cases as under the Representation of the People Act, 1951 still the power to allow amendment as under Order 6, rule 17, Civil Procedure Code, which is conferred on such Tribunals will include the power to allow an amendment by way of further particulars. The enumeration of certain provisions of Order 6, rule 17, is not exhaustive but is only illustrative.

Though the statutory provisions under the Representation of the People Act, 1951, relating to Parliamentary elections is not directly applicable to elections under the Municipalities Act, still the principles of that law may be applied to these cases also by analogy. In the absence of express statutory provisions it is desirable to apply uniform rules to all elections regarding corrupt practices and irregularities.

Kamaraswami Pillai v. *Venkataramana Rao*, (1956) 1 M.L.J. 40 and *Harish Chandra Bajpai* v. *Triloki Singh*, (1957) S.C.J. 297, Explained.

W.P. No. 74 of 1953, differed.

W.P. No. 893 of 1953, applied.

Appeal under Clause 15 of the Letters Patent against the order of the Honourable Mr. Justice Rajagopalan, dated 24th April, 1957 and made in the exercise of the Special Original Jurisdiction of the High Court in W.P. No. 1018 of 1956 presented under Article 226 of the Constitution of India to issue a writ of *certiorari* calling for the records in O.P. No. 138 of 1955 on the file of the Court of the Subordinate Judge, and Election Commissioner, Tiruchirapalli and to quash the order made therein.

G. R. Jagadisan, for Appellant.

S. Ramachandra Ayyar and *V. S. Ramakrishnan*, for Respondents.

The Judgment of the Court was delivered by

Panchapakesa Ayyar, J.—This is an appeal filed by one Thangalakshmi Ammal for setting aside the order of Rajagopalan, J., dismissing her Writ Petition No. 1018 of 1956.

The facts are briefly these : The appellant had stood for election from Ward No. 13 of the Tiruchirapalli Municipality, a double member constituency, one of the seats being reserved for a member of the scheduled castes. The appellant and respondents 1 to 7 were the eight candidates who stood for the election held on 10th

1. (1950) 1 M.L.J. 222.

* Writ App. No. 96 of 1957. 22nd November, 1957.

October, 1955. Respondents 2, 3 and 7 alone were eligible to stand for the reserved seat. Respondent 3, who obtained 680 votes, was declared elected to the reserved seat. The appellant, who got 653 votes, as against the 2nd respondent who polled 652, was declared elected to the non-reserved seat on the strength of his having secured one more vote. The 1st respondent obtained only 616 votes. Respondents 1 and 2 filed O.P. No. 138 of 1956 to set aside the election of both the candidates who had been declared successful. The Election Commissioner pointed out that no allegation of the commission of any corrupt practice by the candidates or by their agents had been mentioned and pressed for adjudication, and that the election had been sought to be avoided only on the ground that the irregularities in the conduct of the election had materially affected the final result of the election. He found, after a scrutiny of the votes cast, with the help of his clerks the candidates themselves being absent (1) that 158 voters polled their votes at wrong booths, and that the reception of their votes was in contravention of rule 27-A (1) (*c*) of the Rules for Conduct of Election of Municipal Councillors : (2) that there were 12 instances where the same voter had voted twice ; (3) that there were two instances of personation of dead voters ; (4) and that there were four instances of personation of living voters. He held applying these facts, to the facts of this election, that the results of the election had been materially affected by the improper reception of the above votes in the final counting by the Returning Officer. He, therefore, set aside the election, and ordered a fresh election.

Irregularities under each of the above four heads had been alleged and relied on in the petition, and instances were given in the lists attached to the petition, as required by rule 2. But, on finding that some of the particulars mentioned in the lists were not correct, as per the facts discovered later on, respondents 1 and 2 sought and obtained permission to amend the particulars in the lists. This amendment petition, which was allowed by the Election Commissioner, is I.A. No. 147 of 1956. The legality of that amendment was the thing most hotly contested in the writ petition before Rajagopalan, J., and before us in this appeal.

Some minor contentions, which were raised before Rajagopalan, J., are not now raised before us by Mr. Jagadisan, the learned counsel for the appellant. The most important of these was that the Election Commissioner did not count these votes in the presence of the candidates, and that this contravened the rules of natural justice and vitiated his counting. But, as it was not alleged that the counting, as a matter of fact, was not correct, or that the Election Commissioner had acted wrongly or with improper motive, Rajagopalan, J., negatived that contention, and Mr. Jagadisan did not very properly raise it again before us. Some things like examination for age or impotency or veneral disease, need not be done of one party, in the presence of the other by doctors etc.

Rajagopalan, J., did not agree with the contention of the appellant in the writ petition that the Election Commissioner had no power at all to allow any amendment to the petition, giving further particulars of additional persons who had voted in the wrong booths, or who cast double votes or impersonated dead and living persons. He overruled the contentions of the appellant that was not allowed to be covered by an amendment, regarding Municipal Election Petitions, though section 83 (3) of the Representation of the People Act gave such a right of amendment in those petitions ; relying on the Supreme Court ruling in *Harish Chandra Bajpai* v. *Triloki Singh*[1], Rajagopalan, J., finally dismissed the writ petition though without costs.

We may add here that the third respondent, who had obtained a larger number of votes than the appellant, and whose election too had been set aside, has not filed any writ petition.

We have perused the records and heard the learned counsel on both sides in this appeal. The main, and indeed the only, contention of Mr. Jagadisan

1. (1957) S.C.J. 297 : A.I.R. 1957 S.C. 444 (S.C.).

before us was that Rajagopalan, J., was not right in relying on the decision of the Supreme Court (given after the filing of the writ petition) in *Harish Chandra* v. *Triloki Singh*[1], as it was not applicable to this case of Municipal Elections and as it did not, and could not overrule the direct ruling of Rajagopala Ayyangar, J., in W.P. No. 74 of 1956 in a Municipal Election Petition, or the observations of a Bench of this Court in *Komaraswami Pillai* v. *Venkataramana Rao*[2], approving of the observations in that decision, namely, that further particulars involving mention of further persons guilty of the corrupt acts alleged originally in the petition, could not be allowed to be covered by any amendment, and that only the charges relating to the persons already named in the lists attached to the petition should be gone into. Mr. Jagadisan relied strongly on the observations of the Bench that an Election Tribunal is not a Court of law or equity but a creature of statute and has no Common Law powers. He pointed out that the Supreme Court had relied on the provisions of the Representation of the People Act, and especially on the provisions of sections 83 (3), 90 (2) and 92, and that he had held that there were two powers of amendment open to the petitioner under that Act, namely, the specific power of amendment given under section 83 (3), which would not be limited to the period allowed for filing the election petition itself, and a residuary power regarding amendments not covered by section 83 (3), and exercised under Order 6, rule 17, Civil Procedure Code arising out of sections 90 (2) and 92, but to be exercised within the period of limitation allowed for filing the petition. He went on to argue that, as there is no provision similar to section 83 (3) of the Representation of the People Act in the case of Municipal Election Petitions, that power must be deemed not to exist. We cannot agree with his contention. Though an Election Tribunal has no inherent or Common Law powers, like a Court of law or equity, and though there is no such express power given in the case of Municipal Election Petitions, like the power under section 83 (3), we are of the opinion that that power must be implied to exist and to be included in the power of amendment under Order 6, rule 17, Civil Procedure Code, which, even according to Mr. Jagadisan, would exist in the case of Municipal Election Petitions also under the Supreme Court ruling. Mr. Jagadisan wanted to urge that, because only six matters have been mentioned in the *Explanation* to rule 6, as (*a*) to (*f*), the power of amendment would not exist in the case of Municipal Election Petitions, but, when pointed out that there is no word 'only' after the phrase, 'the following matters' in the *Explanation*, and that the six matters appear to be illustrative and not exhaustive, he finally had to agree, after perusing the Supreme Court ruling, that the power to amend given by Order 6, rule 17, Civil Procedure Code would exist in the case of Municipal Election Petitions also, but only subject to the limitation period of one month. But this power is not mentioned in the *Explanation* to rule 6 which shows that it is only illustrative.

We are satisfied that Mr. Jagadisan is right in regarding the non-applicability of the Supreme Court decision directly to this case which is governed by the Municipalities Act and Rules. But we are of the opinion that analogously the same principle should be applied, as the principles on which amendments are granted under Order 6, rule 17 and on which elections are set aside are more or less common to Municipal Elections and Panchayat Elections and Elections to Legislatures and Parliament. The importance alone varies. It is desirable to apply uniform rules, regarding corrupt practices and irregularities which clearly affect the results in the interests of clarity and public benefit wherever there is no law to the contrary. Here there was admittedly the power of amendment given under Order 6, rule 17 regarding further instances of the same corrupt acts or irregularities given in the petition. It is only an amendment giving new heads of corruption or irregularity which is forbidden according to the above Bench ruling. We have no compunction, in the matter, seeing how important it is to ensure the purity of elections in the democratic set up of our country and also seeing that the appellant himself was not charged with any corrupt or criminal or quasi-criminal or shady act, like

1. 1957 S.C.J. 297 : A.I.R. 1957 S.C. 444 (S.C.).
2. (1956) 1 M.L.J. 40.

making persons impersonate dead or living voters which will make him liable to prosecution or affect his reputation. Nor is it as if a rival has been declared elected. The whole election has been set aside, and the appellant, who was declared elected simply because of his securing one vote more is free to compete again and get elected.

Mr. Jagadisan frankly conceded that, even if we allow this appeal and confine ourselves to the original lists filed by the petitioner, and take only the proved cases of voting in the wrong booths and impersonation of dead or living voters, the appellant cannot succeed straightaway in the Election Petition, and the petition would have to be sent back for further investigation and inquiry and orders, as we have rejected his contention that the Election Commissioner acted illegally in scrutinising the ballot papers in the petitioner's absence. Then also there would be a delay, perhaps even a greater delay, than by the re-election ordered by the Election Commissioner. But he stated that the appellant was naturally anxious to avoid fresh election and to rest on his legal rights and try at least to sit for a while as Councillor, by filing a stay application and try his luck once more that way, instead of facing a new election with all the expenses and uncertainty. We cannot help him.

We are unable to agree with Mr. Jagadisan that the power under Order 6, rule 17, Civil Procedure Code should be limited, in the case of petitions attacking Municipal Elections, to the period of one month within which the petitions themselves should be filed, even though he could not deny that all such instances in the case of elections by ballot will take more than one month to find out. The observations of the Supreme Court to that effect in *Bajpai's Case*[1], regarding the exercise of the powers of amendment under Order 6, rule 17, Civil Procedure Code, in a petition under the Representation of the People Act, rested, in our opinion, on the fact that there was ample power of such amendment given under section 83 (3) of that Act, and Order 6, rule 17 was only a supplementary provision for other amendments where section 83 (3) would not apply. The Bench ruling in *Kumaraswami Pillai* v. *Venkataramana Rao*[2], confined amendments regarding new corrupt acts, etc., alone to the period of limitation. So the ruling of the Supreme Court regarding that matter must be confined to the provisions under the Representation of the People Act, and cannot be held to apply to the implied powers of amendment under Order 6, rule 17, Civil Procedure Code in the case of Municipal Election Petitions where no powers of amendment similar to that of section 83 (3) of the Representation of the People Act is given. We may note that under section 83 (2) as full a statement as possible as to the names of the parties alleged to have committed such corrupt or illegal practice and the date and place of the commission of each such practice is directed to be filed by the petitioner in an election petition. In view of the less drastic wording in rule 2 regulating Municipal election petitions it is obvious that the implied powers of amendment, under Order 6, rule 17, Civil Procedure Code given in the case of Municipal Election Petitions would be larger. Of course, it is for the Tribunal to decide what particular amendments, even within the restricted scope, it would allow or not, regard being had to the delay, and to justice and equity.

We are unable to agree with the ruling of Rajagopala Ayyangar, J., in Writ Petition No. 74 of 1953, where the learned Judge held against any power of amendment, at all, and did not allow amendment even by way of adding more persons in the lists under the heads of corruption and irregularity already given. Mr. Ramachandra Iyer, the learned counsel for the opposite side, relies on the ruling of Govinda Menon, J., as he then was, in Writ Petition No. 893 of 1953, a panchayat re-election case, holding directly an opposite view to that of Rajagopala Ayyangar, J., and allowing an amendment. We consider that it will apply also to Municipal Election Petitions. Those are thus two decision by single Judges (letting alone the judgment of Rajagopalan, J., under appeal and we, constituting a Bench, have the right to choose between them or even to differ from them all. For the reasons given already we prefer the view of Govinda Menon, J., and hold that in the case of Municipal Election Petitions there is a power of amendment, under Order 6,

1. (1957) S.C.J. 297: A.I.R. 957 S.C. 444(S.C.). 2. (1956) 1 M.L.J. 40.

rule 17, Civil Procedure Code without reference to the limitation period of one month, but restricted to giving further names of persons guilty of corrupt practices and material irregularities already alleged in the petition. The Bench ruling in *Kumaraswami Pillai* v. *Venkataramana Rao*[1], did not directly decide this point as pointed out by Rajagopalan, J. The observations in the Bench judgment approving of the observations in the judgment of Rajagopala Ayyangar, J., must be construed to be mere *obiter*, as the particular point did not directly arise for decision before the Bench. So, there is no conflict between the decision of that Bench and our view now, and there is no need to refer the matter to a Full Bench. The judgment of Rajagopala Ayyangar, J., on this point in Writ Petition No. 74 of 1956, is in our opinion, wrong and is overruled. It follows that this appeal deserves to be and is hereby dismissed, but in the peculiar circumstances, without costs. Counsel's fee Rs. 100.

R.M. ——— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE RAMASWAMI.

Rangappa Goundan (died) and others .. *Appellants**

v.

Marappa Goundan .. *Respondent.*

Transfer of Property Act (IV of 1882), section 3—Notice—Abstention from enquiry—Effect of.

Civil Procedure Code (V of 1908), section 35 (2)—Awarding of costs—Principles.

Where a person abstained from making further enquiries about the rights of the person in possession and did not cause a search to be made in the office of the Sub-Registrar to ascertain if there was any encumbrance over the property, his omission must be held to be wilful or grossly negligent and he would be said to have notice of the prior transaction.

Where the Court directs that any costs shall not follow the event, the Court shall state its reasons in writing. Though awarding of costs shall be in the discretion of the Court, such discretion must be judicial discretion to be exercised on legal principles.

Parvathathammal v. *Sivasankara Bhattar*, (1951) 2 M.L.J. 191, referred.

Appeal against the Decree of the Court of the Subordinate Judge of Coimbatore in Appeal Suit No. 41 of 1953, preferred against the Decree of the Court of the District Munsif of Tiruppur in Original Suit No. 249 of 1951.

K. S. Desikan and *K. Raman*, for Appellants.

K. Vaitheeswaran, for Respondent.

The Court delivered the following

JUDGMENT.—This is an appeal preferred against the Decree and Judgment of the learned Subordinate Judge of Coimbatore in Appeal Suit No. 41 of 1953 modifying the Decree and Judgment of the learned District Munsif of Tiruppur in Original Suit No. 249 of 1951.

The suit property originally belonged to Begavathiakkal. She sold the property to Marappa Goundan under Exhibit A-2. Subsequently, she executed a mortgage to Marappa Goundan including the Exhibit A-2 item also. Later on, she sold the mortgaged property to Rangappa Goundan under Exhibit B-1. Therefore, both Marappa Goundan and Rangappa Goundan have been competing for the title in respect of the Exhibit A-2 property. Both the Courts held in favour of Marappa Goundan and hence this Second Appeal.

The contention of Rangappa Goundan, based upon a decision of the Judicial Committee of the Privy Council in *Sarat Chunder Dey* v. *Gopal Chunder Laha*[2] and the decision of the Patna High Court in *Mahanth S. N. Gir* v. *Jugeshwar*[3], is that Marappa Goundan is precluded from asserting title on account of the bar of estoppel. Those decisions laid down on the facts of those cases that the main question to be decided under section 115 of the Indian Evidence Act is whether the representation

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1. (1956) 1 M.L.J. 40.

* S.A. No. 260 of 1955. 30th October, 1957.

2. (1892) L.R. 19 I.A. 203 : I.L.R. 20 Cal. 296 (P.C.).

3. (1949) I.L.R. 28 Patna 519.

has caused the person to whom it has been made to act on the faith of it and that existence of estoppel does not depend on the motive or on the knowledge of the matter on the part of the person making the representation and that it is not essential that the intention of the person whose declaration, act or omission has induced another to act, or to abstain from acting, should have been fraudulent, or that he should not have been under a mistake or misapprehension. On this foot, it was contended that though it may be that Marappa Goundan on account of a mistake allowed the property to be included in Exhibit A-3, that will not avail him to meet the plea of estoppel of Rangappa Goundan who claims to be a *bona fide* purchaser for value.

But it was contended on the other side and which contention has been accepted by both the Courts on the foot of a decision of this Court in *Parvathathammal* v. *Sivasankara Bhattar*[1], that if Rangappa Goundan had abstained from making the further enquiries about the rights of the person in actual possession, that abstention must be attributed to gross negligence and even considered to be wilful abstention and that, therefore, he must be held to have had notice of the agreement to sell in favour of the plaintiff.

In this case, this Rangappa had admitted that he knew that Marappa Goundan was in possession of the property. This Rangappa says that he thought that Marappa was in possession as a possessory mortgagee. He made no further enquiries admittedly. He did not have a search made in the office of the Sub-Registrar to ascertain if there was any other encumbrance regarding this item, or any other transaction evidenced by a registered document. If he had done that, he would have immediately known of the existence of Exhibit A-2. So, his omission in not having done that must be held to be wilful, or as grossly negligent, and in that view Rangappa Goundan cannot claim any right to redeem this item.

The net result of this analysis is that the conclusion of both the Courts that the appeal item is not liable to be redeemed in Original Suit No. 249 of 1951 is correct.

Before parting with this case, I have to deal with another point, *viz*., disturbance by the lower appellate Court of the Costs awarded by the learned District Munsif. The order of the District Munsif regarding costs could not be upheld by the learned Subordinate Judge by reason of section 35 (2), Civil Procedure Code which lays down that where the Court directs that any costs shall not follow the event, the Court shall state its reasons in writing. Though awarding of costs shall be in the discretion of the Court, such discretion must be a judicial discretion to be exercised on legal principles, not by chance, nor by medley nor by caprice nor in temper. The learned Subordinate Judge has given sound reasons for making costs follow the event. Therefore, the order of the learned Subordinate Judge merits no interference.

In the result, the Second Appeal has got to be and is hereby dismissed and in the circumstances without costs.

No leave.

V. S. —— *Second Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. RAJAGOPALAN, *Officiating Chief Justice* AND MR. JUSTICE RAJAGOPALA AYYANGAR.

In the matter of enrolment of R. Krishnan.

R. Krishnan .. *Petitioner**.

Stamp Act (II of 1899), Schedule I-A, Article 25 of (as amended by Madras Act VI of 1922)—Person enrolled as an advocate of the Mysore High Court seeking enrolment in the Madras High Court—Exemption from Stamp Duty payable—Whether can be claimed.

The petitioner whose name was borne on the roll of the High Court of Mysore when it was a Part B State is now automatically on the roll of the Mysore High Court as now constituted a Part

1. (1951) 2 M.L.J. 191.

* C.M.P. No. 5281 of 1957. 6th December, 1957.

A State under the provisions of the States Reorganization Act (XXXVII of 1956) and the Mysore High Court is a High Court of the class or category as the Madras High Court.

The scheme of the Government of India Act as well as of the Constitution was that the Indian Legislature has a right only to make substantive law in relation to stamp duties as distinguished from the rates of stamp duties except in regard to the items listed in Entry 91 of the Union List. Though the sections of the Indian Stamp Act would apply to the State in regard to the instruments specified in Entry 91, the rates of Stamp Duty in respect of instruments other than those set out in Entry 91 is a matter which is exclusively within the State jurisdiction. At the time of his enrolment the Indian Stamp Act applied to Mysore and he paid the stamp duty fixed by the authority which under the Constitution had the right to fix and levy it.

The petitioner was held to be entitled to the exemption from payment of Stamp Duty.

In the matter of Krishnaswami, (1942) 1 M.L.J. 559: I.L.R. (1942) Mad. 663 (F.B.) and *Abdul Khader In re*, (1953) 2 M.L.J. 457, Followed.

Petition under Article 30 of the Stamp Act (II of 1899) and under section 151 of Civil Procedure Code, Act V of 1908, praying that in the circumstances stated in the affidavit filed therewith the High Court will be pleased to exempt the petitioner from paying the Stamp Duty for his enrolment as an Advocate of this High Court.

R. Gopalaswami Ayyangar, for Petitioner.

The Advocate-General (*V. K. Tiruvenkatachari*) on behalf of the State.

The Order of the Court was made by

Rajagopala Ayyangar, J.—The petitioner who is seeking enrolment as an Advocate of this Court has filed this petition praying for the order that he might be exempted from payment of the Stamp duty payable for the entry of his name as an Advocate of this Court.

The petitioner is a graduate in law of this University and was enrolled as an Advocate of the former Mysore High Court when Mysore was a "Part B" on 20th January, 1955. He states that he was admitted to the roll of that Court on payment of Rs. 300 which was prescribed by the Mysore Stamp Act then in force. After Mysore became a "Part A" State as a result of the States Reorganisation Act the petitioner became an Advocate of the Mysore High Court under the proviso to section 53 (2) of the States Reorganisation Act. He claims that as he has been enrolled as an Advocate of a High Court—the Mysore High Court—he is exempt from the payment of any Stamp duty under Article 25 of Schedule I-A of the Stamp Act as amended in the Madras State.

Notice of this application was given to the Advocate-General and we have had the benefit of his submissions on the relevant statutory provisions. By our order, dated 4th November, 1957 the exemption prayed for has been granted but we announced that our reasons would be pronounced later.

The levy of Stamp duty payable on enrolment is by virtue of Article 25 of Schedule I-A of the amendments effected to the Indian Stamp Act by the Madras Act VI of 1922. This provision reads:

25. Entry as an Advocate, Vakil or Attorney on the roll of any High Court under the Indian Bar Coucils Act, 1926 or in exercise of powers conferred on such Court by Letters Patent or by the Legal Practitioners Act, 1884.	
(*a*) in the case of an Advocate or Vakil	.. Six Hundred and twenty-five rupees.
(*b*)	

Exemption.

Entry of an Advocate, Vakil or Attorney on the roll of any High Court, when he has previously been enrolled in a High Court.

It would therefore be seen that the only question to be considered is whether the High Court of Mysore is "a High Court" within the meaning of the exemption. Similar questions have come up for decision earlier in this Court and we shall first refer to these decisions before dicussing the precise scope of the statutory provisions.

In the matter of *Krishnaswami*[1], dealt with the question whether an Advocate who had been enrolled in the Rangoon High Court and who subsequently sought enrolment in the Madras High Court came within the exemption. A Full Bench of this Court answered this in the affirmative, Leach, C.J., who delivered the judgment of the Court saying :

"That Article 30 of the Indian Stamp Act (It is obviously a mistake because the stamp duty in the Madras State in respect of the relevant entry is governed not by Article 30 in Schedule I to the Indian Stamp Act but by Schedule 1-A introduced by the Madras Act VI of 1922 where this Article is numbered as 25) exempts an Advocate who has already paid the required fee on enrolment in a High Court from payment of it when he is enrolled in another High Court. The term 'High Court' of course must be deemed to be a High Court established in British India. The Rangoon High Court can no longer be regarded as an Indian High Court, but it had that status when the petitioner was enrolled, and as he paid the fee required by the Stamp Act on that occasion we consider that he comes within the exemption contained in the article."

The next decision on this point is by a Bench of this Court in *Abdul Khader*, In re[2]. The petitioner was an Advocate of the Travancore-Cochin High Court—a High Court in a Part B State. The learned Judges held that the petitioner was not entitled to the exemption. This was rested on two bases : (1) the benefit of the exemption could arise only in cases where the main entry itself would be applicable ; that is, the original enrolment referred to in the exemption must be of the same class as the class of enrolment which the petitioner seeks. The Travancore-Cochin High Court was a High Court in a Part B State and so was not of the same category or class as the Madras High Court—a High Court in a Part A State. (2) The High Court referred to in the exemption is a High Court within the territory to which the Stamp Act applied, in this respect following the decision of the Full Bench in *Krishnaswami's Case*[1]. The Indian Stamp Act did not extend to Travancore-Cochin and hence an enrolment in the Travancore-Cochin High Court would not be an enrolment in "a High Court" within the exemption. A Bench of the Andhra Pradesh High Court followed the decision of the Bench of this Court in *Adbul Khader*, In re[2], vide, *Mannava Venkata Rao*, In re[3] and held that Advocates of the Mysore High Court could be enrolled in the Andhra Pradesh High Court without payment of any stamp duty by reason of their case being covered by the exemption, the reasoning upon which this decision was rested being that the Indian Stamp Act was in force in Mysore even while it was a Part B State that is before the States Reorganisation Act by reason of the Indian Stamp (Amendment) Act (XLIII of 1955) and that as the petitioner was on the roll of the Advocates of the Mysore High Court by reason of the proviso to section 53 (2) of the States Reorganisation Act, both the conditions posited by the decision in *Adbul Khader*[2], In re, were satisfied.

There cannot be any doubt that the petitioner satisfied the first condition laid down in *Adbul Khader*, In re[2], namely his name being entered on the roll of a High Court of the same category as the Madras High Court. Mysore is under Act XXXVII of 1956 (The States Reorganisation Act) a Part A State and the High Court of Mysore is therefore a High Court of the class or category as the Madras High Court. The petitioner whose name was borne on the roll of the High Court of Mysore when it was a Part B State is now automatically on the roll of the Mysore High Court as now constituted. The proviso to section 53 (2) of the Act enacts :

"Provided that, subject to any rule made or direction given by the High Court for a new State in exercise of the power conferred by this section, any person who, immediately before the appointed day, is an Advocate entitled to practice or an Attorney entitled to act in any such High Court...... ....as may be specified in this behalf by the Chief Justice of the High Court for the new State, shall be recognised as an Advocate or Attorney entitled to practice or to act, as the case may be, in the High Court for the new State."

The question that remains for consideration therefore is whether the other condition laid down in *Adbul Khadar's Case*[2], namely that the enrolment must be in the High Court to which the Stamp Act applies is satisfied by the petitioner.

1. (1942) 1 M.L.J. 599 : I.L.R. (1942) Mad. 663 (F.B.).
2. (1953) 2 M.L.J. 457.
3. (1957) 1 An.W.R. 244.

Incidentally we might mention that the question has also been raised as to whether it is necessary to satisfy this condition.

The learned judges of the Andhra Pradesh High Court have held that Mysore was a territory to which the Stamp Act was made applicable by reason of the Central Act (XLIII of 1955). It has however been pointed out that the extension of the Indian Stamp Act to the Part B States is not absolute but subject to the conditions laid down in the enactment. Though section 2 of Act XLIII of 1955 enacted :

> "In the Indian Stamp Act, 1899 . . . . . . Unless otherwise expressly provided, the 'States' (which meant the Part A States) wherever they occur, the word 'India' shall be substituted."

Section 3 of the Amending Act specifically enacted a proviso as regards the extent of the operation of the enactment :

> "Section 1 (2) : It extends to the whole of India except the State of Jammu and Kashmir.
>
> Provided that it shall not apply to Part B States . . . . except to the extent to which the provisions of this Act relate to rates of stamp duty in respect of the documents specified in Entry 91 of List I in the Seventh Schedule to the Constitution."

It was pointed out that this qualification in the extension of the Stamp Act was not noticed by the learned Judges of the Andhra Pradesh High Court whose judgment appears to proceed on the basis that Article 30 of the Schedule I of the Indian Stamp Act which related to the stamp duty payable for the entry on the roll of the Advocates was in operation in the Mysore State when the Advocate, who sought enrolment in the Andhra Pradesh High Court was enrolled in Mysore when the latter was a Part B State. There is no doubt that this aspect is not adverted to in the judgment of Subba Rao, C.J. But in our opinion this does not affect the correctness of the decision.

Admittedly the stamp duty paid by the petitioner when he was enrolled in Mysore, was under the Mysore Stamp Act and not under Article 30 of Schedule I of the Indian Stamp Act, 1899. But in our opinion the argument which seeks to deny to a payment under the Mysore Stamp Act the efficacy of a payment under Article 30, Schedule I of the Indian Stamp Act, 1899, ignores the constitutional basis upon which Legislation in relation to stamp duties rests in India. At the time when the Indian Stamp Act, 1899 (a central enactment) was enacted the duties levied under each of the several articles in its Schedule became part of central revenues, no part of it being specifically allocated to the provinces. A change was however introduced into this system by the Montford Reforms of 1919.

Section 45-A of the Government of India Act, 1919, enacted :

> 45-A (1) Provision may be made by rules under this Act :
>
> . . . .
>
> (b) for the devolution of authority in respect of provincial subjects to local Governments and for the allocation of revenues or other moneys to those Governments.

Devolution Rules were framed under this provision and rule 14 (1) read :

> 14 (1): The following sources of revenue shall in the case of Governors provinces be allocated to the local Government as sources of provincial revenue namely :—
>
> . . . .
>
> (b) receipts accruing in respect of provincial subjects.
>
> . . . .
>
> (f) the proceeds of any taxes which may be lawfully imposed for provincial purposes.

Schedule I to these rules classified subjects of Legislative power into two heads, Central and Provincial—Parts I and II respectively. Item 20 of Part II—List of Provincial subjects ran in these terms :

20. Non-judicial stamps, subject to legislation by the Indian legislature....

Section 80-A (3) laid down the formal requirements which the Provincial Legislatures should comply before enacting these laws :

> "80-A (3) : The local Legislature of any province may not, without the previous sanction of the Governor-General, make or take into consideration any law (*a*) imposing or authorising the imposition of any tax *unless the tax is a tax scheduled as exempted from this provision by rules made under this Act* : *or*...."

In pursuance thereof the Scheduled Taxes Rules were framed which specified the taxes which might be imposed by the provinces either for their purposes or for the purposes of local authorities within them without the previous sanction of the Governor-General. In regard to stamp duties Item 8 of the Schedule I to these rules enabled provincial legislation without previous sanction only in regard to

> "8. A stamp duty other than duties of which the amount is fixed by Indian legislature."

The result of this was that by virtue of the main provisions in section 80-A (3) (*a*) the local Legislature could legislate for the levy of stamp duties on the instruments included in the Stamp Act, 1899, only after obtaining the previous sanction of the Governor-General. Several Provinces took advantage of these provisions and enacted legislation on the subject of stamps after obtaining the previous sanction of the Governor-General under section 80-A (3) making the proceeds part of Provincial Revenues and amending the rates of duties imposed by Schedule I of the Indian Stamp Act, 1899. The Madras Legislature did this by Act VI of 1922 which dealt with all classes of instruments other than Bills of Exchange and a few other items. Article 25 of this Schedule I-A as introduced by the Local Legislature was "Entry as an advocate, vakil or attorney on the roll of any High Court ...." together with the exemption which we have set out earlier. The entry was amended by the Indian Bar Councils Act, 1926, by the inclusion of the words " under the Indian Bar Councils Act, 1926."

The Government of India Act, 1935, effected a substantial change in the law in relation to stamp duties carrying to its logical result the provision of the Devolution Rules and the practice that prevailed thereunder. It also introduced a dichotomy so far as provinces were concerned between the substantive law relating to the levy and collection of the duties including the machinery therefor on the one hand and the rate of the levy. The White Paper proposals started this cleavage by listing " Stamp duties which are the subject of legislation by the Indian Legislature at the date of the Federation " in the exclusively Federal List I and " stamp duties other than those provided for in List I " as a source of Provincial Revenue. This rather vague form received clarification in the report of the Joint Parliamentary Committee. In their revised lists " Fixation of rates of stamp duty in respect of bills of exchange, bills of lading, cheques, letters of credit, promissory notes, policies of insurance, proxies and receipts " was made exclusively Federal (Item 53 of List I) while " fixing of rates of stamp duty in respect of instruments other than those mentioned in Item 53 of List I " was put in as Item 32 in List II— the exclusively Provincial list. The legislative power to enact Stamp Laws in general as distinguished from the "fixation of rates of duty" was assigned to the Concurrent List (Item 10) which read "Law of non-judicial stamps, but not including the fixation of rates of duty ". These recommendations of the Joint Parliamentary Committee were adopted by the framers of the Government of India Act, 1935. The instruments mentioned in Item 53 of List I set out above were allocated to the exclusively Federal List I (item 57)—only instead of the words "fixing of rates of stamp duty" the expression " rates of stamp duty " was used. Item 51 of the Provincial List incorporated the recommended Item 32 of the Joint Parliamentary Committee. The result therefore at this stage was that the Indian Stamp Act, 1899, became " a law with respect to a matter in the Concurrent List " while stamp duties under Entry 25 of Schedule I-A of Madras Act VI of 1922 which applicants for enrolment as Advocates had to pay became " an existing law on a provincial subject." The Constitution of India followed in this respect the pattern of the Government of India Act, 1935. Entry 91 of the Union List reads : " rates of stamp duty in

respect of bills of exchange, cheques, promissory notes, bills of lading, letters of credit, policies of insurance, transfer of shares, debentures, proxies and receipts ", while Entry 63 of the State List provided for legislation in regard to "rates of stamp duty in respect of documents other than those specified in the provisions of List I with regard to rates of stamp duty ". Entry 44 of the Concurrent List dealt with the power to make a law in relation to stamp duties " as distinguished from the rates of stamp duty " in these terms : " Stamp duties other than duties or fees collected by means of judicial stamps, but not including rates of stamp duty".

It will thus be seen that on the scheme of the Government of India Act as well as of the Constitution, the Indian Legislature has a right only to make substantive law in relation to stamp duties as distinguished from the rates of stamp duties except in regard to the items listed in Entry 91. Taking the case of Madras, though the sections of the Indian Stamp Act would apply to the State, as also the rates of stamp duty in regard to the instruments specified in Entry 91, the rates of stamp duty in respect of instruments other than those set out in Entry 91 of the Union List is a matter which is exclusively within the State jurisdiction. It is for this reason that we hold that the fact that the stamp duty paid by the petitioner on his enrolment in the High Court of Mysore was under the Mysore Stamp Act and not under the Entry 30 of Schedule I of the Indian Stamp Act, 1899, is irrelevant because the Union Legislature would have no jurisdiction to fix the rate of stamp duty for enrolment within the Mysore State. In this view, the conditions laid down both by the Full Bench in *Krishnaswami*, In re,[1] and by the decision of the Bench in *Abdul Khader*, In re[2], are satisfied by the petitioner before us. At the time of his enrolment, the Indian Stamp Act applied to Mysore and he paid the stamp duty fixed by the authority which under the Constitution had the right to fix and levy it. Further the petitioner is also an Advocate of a High Court in a Part A State thus satisfying the other condition formulated by the learned Chief Justice in *Abdul Khader's case*[2]. In this view we consider it unnecessary to deal with the question whether the same result would have followed if the Indian Stamp Act, 1899, had not been extended to Mysore by Central Act XLIII of 1955.

We therefore hold that the petitioner is entitled to exemption from payment of stamp duty under Article 25 of Schedule I-A.

V.S. ——— *Ordered accordingly.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. P. V. RAJAMANNAR, *Chief Justice* AND MR. JUSTICE PANCHAPAKESA AYYAR.

S. Jayam Sunder Rajaratnam .. *Appellant**

v.

K. Muthuswami Kangani .. *Respondent.*

Civil Procedure Code (V of 1908), section 13 and section 20—Suit on an ex parte *foreign judgment—Where maintainable—Suit for recovery of money under a foreign judgment—Cause of action for—Institution of suit where defendant owns immoveable property—Jurisdiction.*

Though the judgment and decree of a foreign Court might have been passed *ex parte*, still if it was passed on a consideration of the evidence adduced in the case the decision should be deemed to be one on merits and is valid and conclusive.

A suit for recovery of money *simpliciter* due under a foreign judgment cannot be instituted in any Court merely on the ground that the defendant owns and is possessed of immoveable property within the jurisdiction of that particular Court, as possession of such immoveable property does not give rise to the cause of action for the suit.

Appeal against the decree of the Court of the Subordinate Judge of Tiruchirapalli, in O.S. No. 258 of 1951, dated 14th August, 1952.

1. (1942) 1 M.L.J. 599 : I.L.R. (1942) Mad. 663 (F.B.).
2. (1953) 2 M.L.J. 457.

* Appeal No. 168 of 1953. 11th September, 1957.

S. Amudachari and *A. V. Raghavan*, for Appellant.

K. S. Rajagopalachari, *R. Rangachari* and *N. Venkatachalam*, for Respondent.

The Judgment of the Court was delivered by

Rajamannar, C.J.—In this appeal the defendant in Original Suit No. 258 of 1951 is the appellant. The suit was filed by the respondent in the Subordinate Judge's Court, Tiruchirapalli, for the recovery of a sum of Rs. 8,500 from the defendant on the basis of a foreign judgment and decree which the respondent admittedly obtained in the District Court of Nuwaraeliya, Holden at Hatton, Ceylon, on the 26th of October, 1948. The suit in the Ceylon Court was filed on a promissory note executed by the father of the defendant in favour of the plaintiff on the 17th of April, 1942, for a sum of Rs. 3,500, payable with interest at 18 per cent. per annum. The defendant who is the appellant before us was *ex parte* in that suit and, according to the procedure obtaining in Ceylon, a decree *nisi* was passed after taking the evidence of the plaintiff and finally the decree was made absolute after notice of the decree *nisi* had been served on the defendant and the latter had failed to appear in spite of the notice. In the plaint it was alleged that a decree on the merits had been passed and the defendant had not paid the amount due under that decree. The suit was filed, as already mentioned in the Court of the Subordinate Judge, Tiruchirapalli. Admittedly, the defendant was a resident of Ceylon. In paragraph 8 of the plaint, the cause of action for the suit was alleged to have arisen in the villages of Alathudayanpatti and Alagapuri, Musiri Taluk, Tiruchirapalli District, 'where the defendant owns and is possessed of properties.'

Several pleas were raised in defence, namely: (1) that the plaint disclosed no cause of action for a suit in the Tiruchirapalli Court because the defendant did not reside nor did he have a permanent dwelling within the jurisdiction of that Court; and the cause of action for the suit did not arise within the jurisdiction of the said Court; it was further alleged that the defendant had no immoveable property in the district of Tiruchirapalli at all; (2) the judgment of the Ceylonese Court was not on the merits; and (3) the suit was barred by limitation as the promissory note was dated 17th April, 1942 and the suit was filed in 1951.

On those pleadings several issues were raised of which the following are the most material:

(1) Is the suit in this Court competent?

(2) Is the suit in time?

(3) Does the suit on foreign Judgment lie?

The learned Subordinate Judge of Tiruchirapalli, who tried the suit found in favour of the plaintiff on all these three issues and the suit was decreed. Hence in this appeal the defendant is the appellant.

Mr. S. Amudhachari, the learned counsel for the defendant-appellant first contended that the suit on the foreign judgment was not sustainable because there was no judgment on the merits. The only point he could urge in support of this contention was that the appellant was *ex parte* in that suit. It is clear, however, that though the judgment and decree of a foreign Court might have been passed *ex parte* if it was passed on a consideration of the evidence adduced in the case, the decision must be deemed to have been on the merits. It is in evidence that the plaintiff was examined in the Ceylonese Court and he proved his claim and the Court passed a decree in his favour after it was convinced that the claim put forward by him was true and was established. There is no substance, therefore, in this contention.

There is, however, considerable force in the next contention that the Court at Tiruchirapalli had no jurisdiction to entertain the suit. In our opinion, this contention must prevail. In the plaint the only ground on which it was alleged that the Court of the Subordinate Judge had jurisdiction was that the defendant owned and was possessed of properties in two villages within the jurisdiction of

that Court. It was averred that the defendant owned and was possessed of these properties at the time of the institution of the suit, because the present tense 'owns and is possessed of' was used. As already mentioned the defendant denied the fact he had any immoveable property in Tiruchirapalli. He further raised the legal contention that even if he was possessed of immoveable property situated within the jurisdiction of that Court, nevertheless, that fact alone would not confer jurisdiction on the Court, when the suit was not for the recovery or in respect of immoveable property. The plaintiff did not adduce any evidence to show that the defendant was possessed of any immoveable property within the limits of the Court of the Subordinate Judge of Tiruchirapalli on the date of the institution of the suit. The only evidence adduced by the plaintiff in this matter was the registration copies of two sale deeds, executed on the 5th September, 1948 (Exhibits A-3 and A-4) by the defendant and another to one Palaniyandi Mudaliar. Nothing was mentioned about these two sale deeds in the plaint, as for instance, that these sale deeds were nominal or were otherwise invalid so that the defendant continued to own and possess the properties covered by these two sale deeds. Nor was it alleged in the plaint that the defendant had other immoveable properties within the jurisdiction of the Subordinate Judge of Tiruchirapalli. There was no oral evidence either to prove this fact. The defendant gave no evidence. On this evidence there can only be one conclusion at which any Court can arrive namely, that the plaintiff has not proved that the defendant owned or was possessed of any immoveable property within the jurisdiction of the Court of the Subordinate Judge of Tiruchirapalli on the date of the institution of the suit. The plaint did not contain any other averment to maintain the jurisdiction of the said Court.

Mr. K. S. Rajagopalachari, if we have followed his arguments aright put forward the following alternative contentions. Firstly, he said that the Court of the Subordinate Judge at Tiruchirapalli had jurisdiction under section 20(*c*) of the Code of Civil Procedure which provides that the suit should be instituted in the Court within the local limits of whose jurisdiction the cause of action wholly or in part arises. We are not able to follow, however, what part of the cause of action arose within the local limits of the Tiruchirapalli Court. Admittedly, the promissory note was not executed in India. It was nobody's case that the money was payable at Tiruchirapalli within the limits of the Tiruchirapalli Court. Even assuming that there were immoveable properties within the local limits of the Court we fail to see how the presence of such immoveable properties can give rise to a cause of action for recovery of money due under the foreign judgment.

Mr. Rajagopalachari then referred to section 52 of the Code and the liability of a legal representative of a deceased person by reason of intermeddling with the estate of the deceased. We are not, however, concerned with the liability of the defendant as such; the question is whether the Tiruchirapalli Court has jurisdiction. It may well be that the defendant is liable even to account for the proceeds of the sale of the properties belonging to his father but that fact does not necessarily lead to the conclusion that this liability could be enforced in the Tiruchirapalli Court. No authority was cited in support of this contention of Mr. Rajagopalachari. We have no hesitation in holding that the cause of action neither in whole nor in part arose within the local limits of the Subordinate Judge's Court, Tiruchirapalli.

Mr. Rajagopalachari next referred to section 16(*d*) of the Code. Under that provision, suits for the determination of any other right to or interest in immoveable property shall be instituted in the Court within the local limits of whose jurisdiction the property is situate. We fail to see how this suit is a suit for determination of any right to or any interest in immoveable property. The suit is a plain suit for the recovery of a sum of money. The prayer is for a decree against the defendant for the sum mentioned with subsequent interest and costs. How a suit for the recovery of money, without more, can be described as a suit for the determination of any right to or any interest in immoveable property we are unable to comprehend. Here again, learned counsel was unable to cite any authority in support of his contention. He incidentally also referred to section 44-A of the Code of Civil Pro-

cedure, but for what purpose we are unable to understand. Admittedly, there is no reciprocity between Ceylon and India in the matter of execution of decrees.

It follows, therefore, that the Court of the Subordinate Judge at Tiruchirapalli had no jurisdiction whatever to entertain the suit.

Mr. Rajagopalachari then raised a curious contention which may be comprehensively described as a plea of submission to jurisdiction. He cited to us the rulings in *Ayoob Sait* v. *Thirunavukarasu*[1], and *Subramania Ayyar* v. *Annaswami Aiyar*[2], and also passages from Dicey on Conflict of Laws, 6th Edn., page 357. We must confess that we are unable to follow his argument. Here were several pleas raised by the defendant, including the plea as to jurisdiction, plea of limitation and a plea on the merits. Issues were framed in respect of all the three pleas. If Mr. Rajagopalachari's contention is right it means that the learned Subordinate Judge was not called upon to record even a finding on the issue as to jurisdiction because, according to him, the defendant had submitted to the jurisdiction of the Tiruchirapalli Court. Naturally, learned counsel was unable to cite any authority to support this extraordinary contention. Here was a case where the defendant, admittedly, was not residing within the local limits of the jurisdiction of the Court and no part of the cause of action had arisen within such limits. The suit did not relate to immoveable property which was situated within such limits. The suit was based on a foreign decree and judgment. It was, therefore, a case of total want of jurisdiction in the Court at Tiruchirapalli. We fail to see why the defendant could not raise the plea that the Court had no jurisdiction along with the other pleas that the suit was barred by time and that the suit was not maintainable on the foreign judgment. The defendant could succeed in getting the suit dismissed even if he succeeded on any one of the pleas.

We therefore, hold that the Court of the Subordinate Judge, Tiruchirapalli, had no jurisdiction to entertain the suit filed by the respondent on the foreign Judgment. We allow the appeal and dismiss the suit. No order as to costs either in the Court below or here.

R.M. ——— *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE PANCHAPAKESA AYYAR AND MR. JUSTICE GANAPATIA PILLAI.

Padmavathi .. *Appellant**

v.

Srimad Ananteswarar Temple represented by the Trustees
K. Devados Shenoy and others .. *Respondents.*

Limitation Act (IX of 1908), Article 132—Starting point of limitation—" While the money becomes due "—Interpretation of—Sale deed—Part of sale price left with vendee to meet liability under indemnity bond executed by one of the vendors to cover loss anticipated in regard to possibility of suit by minor children of vendor—Suit to recover unpaid purchase money more than 12 years after attainment of majority by youngest of minors—Maintainability—Deed—Construction—Clause in sale deed—Interpretation.

The term " when the money becomes due " in Article 132 of the Limitation Act should be construed with reference to the capacity of the charge-holder to collect the unpaid money. Out of the consideration for the sale of the properties of the appellant's family for a sum of Rs. 28,000, executed by one *A* and others in 1916 a sum of Rs. 3,000 was retained by the vendee under the sale deed to meet the liability due under an indemnity bond executed by *A* in respect of a litigation, the anticipated loss being in relation to the possibility of the minor children of *A* instituting suits with reference to the properties sold.

The clause in the sale deed in regard to the sum of Rs. 3,000 retained by the vendee was to this effect : " So the sum of Rs. 3,000 is retained with you (the vendee) till such time as a proper release deed exonerating the property from the liability under the bond (indemnity bond) is obtained in your favour......you should pay us the principal amount thus kept in suspense in your hands as soon

1. (1936) 71 M.L.J. 93 : I.L.R. 59 Mad. 918. 2. (1947) 2 M.L.J. 279 : A.I.R. 1948 Mad. 203.
* L.P.A. No. 87 of 1953. 18th September, 1957.

as the release mentioned above is procured in your favour". The youngest of the three minors attained majority in 1928.

The appellant filed the suit for recovery of the amount of Rs. 3,000, in 1948 claiming that as the release deed had not been procured till 1942, the suit was in time.

Held : that the clause in the sale deed which was intended for the benefit of the vendee thereunder should be construed with reference to the capacity of the charge-holder to collect the unpaid purchase money that is, on the happening of the contingency mentioned in the deed, and the appellant could not take advantage of the clause to suit his own convenience and claim a fresh start of limitation. The money became due and payable on the true construction of the sale deed, the moment the liability under the indemnity bond was extinguished either by efflux of time or otherwise or by any voluntary act of the parties like the execution of the contemplated release deed. Once the liability was extinguished, it was open to the vendor or to his successor-in-interest to claim the amount left with vendee. This event happened in 1921 the last of the minors having attained majoritty three years earlier in 1918, and none of the minors having filed a suit. Limitation started running in 1921 and the right to collect the money became barred in 1933. Consequently the suit filed in 1948 was barred by limitation.

Appeal under clause 15 of the Letters Patent against the Judgment and order of the Hon'ble Mr. Justice Mack, dated 6th March, 1953, in A.A.O.No. 306 of 1950, preferred against the order of the District Court of South Kanara, dated 25th February, 1950 in A.S.No. 183 of 1949 (O.S.No. 17 of 1948, Sub-Court, South Kanara).

K. Y. Adiga and *K. P. Adiga*, for Appellant.

A. Narayana Pai, for Respondents.

The Judgment of the Court was delivered by

Ganapatia Pillai, J.—This Letters Patent Appeal is directed against the decree and Judgment of Mack, J., which set aside the order of remand of the District Judge of South Kanara and restored the Judgment of the learned Subordinate Judge of that place. The suit out of which this appeal arises was laid by the present appellant for recovery of unpaid purchase money due under the sale Exhibit A-2 of the year 1916. This sale deed dealt with property belonging to the appellant's family and the total price due under the deed was Rs. 28,000. Out of this, a sum of Rs. 3,000 was retained by the vendee, one D'Souza, to meet the liability due under the indemnity bond Exhibit B-1. This indemnity bond was given by Ananthayya Konde, one of the vendors, in regard to a litigation which releated to another property in O.S. No. 226 of 1912. The anticipated loss related to the possibility of three minor children of Ananthayya Konde abovementioned instituting suits with reference to the properties involved in O.S. No. 226 of 1912, and admittedly the youngest of these minors attained majority in 1918. D'Souza the purchaser under Exhibit A-2, sold the property to Ananteswarar Temple, the respondent in this appeal, some time in 1934. The suit was dismissed by the learned Subordinate Judge on the finding that under Article 132 of the Limitation Act the suit should have been brought within 12 years from the date of the sale deed Exhibit A-2. There are also other findings of the learned Subordinate Judge which it is not necessary to deal with for the purpose of this appeal. The learned District Judge set aside this finding of the learned Subordinate Judge on the question of limitation by taking the view that according to the term in Exhibit A-2 the plaintiff had 12 years from the date when a release deed was procured from the persons who were entitled to the benefit of the indemnity under Exhibit B-1 and since the release deed had not been so procured till 1942, the suit was in time. Mack, J., disagreed with this view and held that the term "when the money becomes due" occurring in Article 132 of the Limitation Act should be construed with reference to the capacity of the charge-holder to collect the unpaid purchase money, in this case on the happening of the contingency mentioned in Exhibit A-2. The term in Exhibit A-2 is as follows :

"So the sum of Rs. 3,000 is retained with you (the vendee) till such time as a proper release exonerating the property from the liability under the bond is obtained in your favour. You should pay interest on the said amount of Rs. 3,000 at 3½ per cent. per annum on the 14th June every year and you should pay us the principal amount thus kept in suspense in your hands as soon as the release mentioned above is procured in your favour".

The interpretation of this clause accepted by the learned District Judge would lead to the absurd result that if for some reason or other the party interested in

getting the release deed, postpones or abandons such getting, the starting point of the period of limitation will be indefinitely postponed. We entirely agree with Mack, J., when he says that this term in Exhibit A-2 was intended only for the benefit of the vendee. The plaintiff in the suit the appellant before us, could not take advantage of this clause by causing P.W. 1 to execute a release deed in 1942, nine years after the period of limitation had run out and then claim a new starting point of limitation from that date. The true principle is that the unpaid purchase money became due that is payable according to the true construction of Exhibit A-2 the moment the liability under Exhibit B-1 was extinguished either by efflux of time or otherwise or by voluntary act of parties like execution of the contemplated release deed. Once the liability was extinguished it was open to the vendor to claim the sum of Rs. 3,000 left with the vendee. This event happened in 1921. The last of the minors had attained majority three years earlier, and none of the minors had filed a suit. Consequently we agree with Mack, J., in holding that the unpaid purchase money claimed in the suit became payable in 1921 and the period of limitation started running then. The right to collect this money had become barred even in 1933, one year before the date when the Ananteswarar Temple purchased this property and this suit was filed only in 1948. This appeal is therefore dismissed, but in the circumstances, without costs.

P.R.N. — *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE PANCHAPAKESA AYYAR.

Varadarajulu Reddiar .. *Petitioner**

v.

Venkatakrishna Reddiar and others .. *Respondents.*

Court-Fees Act (VII of 1870) as amended in Madras, section 7 (iv) (b)—Scope—Suit for partition —Reply notice denying right to partition and joint possession—Proper Court-fee payable.

In the majority of partition suits a reply notice will deny the right to partition and also deny joint possession. It would be unjustifiable or even illegal for that reason to compel the plaintiff seeking partition to pay Court-fee under section 7 (iv) (*b*) and deprive him of the right given to him under the law to file a suit for partition paying Court-fee only on that basis.

In re *Sathappa Chettiar*, (1954) 2 M.L.J. 400 : I.L.R. (1955) Mad. 810, distinguished.

Petition under section 115 of Act V of 1908, praying the High Court to revise the order of the Court of the Subordinate Judge of Cuddalore, dated 27th August, 1955, and made on checkslip in O.S. No. 78 of 1955.

K. S. Desikan, for Petitioner.

N. R. Raghavachariar, for Respondents 1 and 3.

V. Ramaswami for the Additional Government Pleader (*K. Veeraswami*), on behalf of the State

The Court made the following

ORDER.—This is a petition by one Varadarajulu Reddiar, the plaintiff in O.S. No. 78 of 1955 on the file of the Subordinate Judge, Cuddalore, for revising and setting aside the order of the learned Subordinate Judge directing him to pay Court-fee under section 7 (v) of the Court-fees Act on a sum of Rs. 38,000 the market value of all the unalienated properties claimed by him to be liable to be partitioned in the suit. The main basis for the lower Court's order was that the allegation of *joint possession* set up by the plaintiff as regards them was belied, at least regarding six items of properties, the old house, the new house and four plots of land by the admission of the plaintiff himself in O.S. No. 49 of 1953, District Munsif's Court Tindivanam, wherein he had expressly stated that, in or about 15 years ago, that is, about 1938, the house GHJK (old house) and items 2 and 3 of the plaint fell to his shares, the house

* C.R.P. No. 1191 of 1956. 11th October, 1957.

MLPO (new house) and the properties AENM and QMNEVS fell to the share of defendant 1 and were exclusively enjoyed by him thereafter, and he was paying the kist for the lands separately though, no doubt, he alleged that some wells and all other immoveable and moveable properties were enjoyed in common even after such partition. Mr. K. S. Desikan, the learned counsel for the petitioner, could not get over this admission, and, indeed, did not want to get over it. But his contention was that, in addition to the Court-fee already paid on the plaint, only Court-fee on the market value of the above six items could be demanded, and not Court-fee on the value of all the unalienated properties covered by the partition suit. He pointed out that, but for that admission in that suit, whose plaint was asked, in the plaint in this suit, to be treated as part of it, the petitioner need not have paid anything more than the Court-fee he had already paid as for an ordinary partition suit. That is so. But that, of course, will not help him when it is a question of paying the Court-fee under section 7 (v) on the market value of the above six items, in addition. The question, then, is whether the lower Court was justified in demanding Court-fee on the market value of all the other unalienated items moveable and immovable, covered by the suit also. Mr. Desikan submitted that it was not; and I agree with him. The learned Additional Government Pleader contended that, since, in the reply notice, the first defendant had denied the right of the plaintiff to partition regarding the other unalienated items also, alleging that there was no joint possession regarding them and that a complete partition had already taken place, the plaintiff should pay Court-fee under section 7 (v), or at least under section 7 (iv) (*b*), regarding those other items. I cannot agree. The ruling of a Bench of this Court in In re *Sathappa Chettiar*[1], relied on by the Additional Government Pleader, will have no application to the facts of this case, as, there, the right to a share was given up, on the plaintiff's behalf by his guardian, and then it was sought to be resuscitated, and, so section 7 (iv) (*b*) of the Court-Fees Act was held to apply, as the suit was one to *enforce a right to a share* in the property on the ground that it continued to be joint family property, despite the prior giving up. Then, the learned Additional Government Pleader urged that whenever a reply notice to the person seeking partition denies his right to partition and denies joint possession of the properties, that will be enough to bring the operation of section 7 (iv) (*b*). The argument is unsustainable. In the majority of partition suits, a reply notice will deny the right to partition and also deny joint possession. For the reason, to compel the plaintiff seeking partition to pay Court-fee under section 7(iv) (*b*), and to deprive him of the right given to him under the law to file a suit for partition, paying Court-fee only on that basis, will be unjustifiable and even illegal.

In the end, therefore, I modify the order of the learned Subordinate Judge and direct the petitioner to pay Court-fee, in addition to the Court-fee already paid, on the market-value of the old house, new house and the four bits of land referred to above to be ascertained by the lower Court either by appointing a commissioner or by any other satisfactory method. The direction that the petitioner should pay any more Court-fee (on the other unalienated immoveable properties or moveable properties), than what has been mentioned above, is set aside. One month's time is given to the petitioner to pay the additional Court-fee after the amount due is determined by the lower Court, after valuing the six items. In the circumstances, all the parties will bear their own costs.

Mr. K. S. Desikan prays for permission to put in an amendment petition in the lower Court, if the petitioner thinks fit, dropping the claim to partition of the old house, new house and the four other properties (partitioned already according to O.S. No. 49 of 1953), and escape the payment of the additional Court-fee ordered by me. He is free to do so.

V.S. —— *Order modified.*

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1. (1954) 2 M.L.J. 400 : I.L.R. (1955) Mad. 810.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE RAJAGOPALA AYYANGAR.

T. Manickavasagam Chettiar .. *Petitioner**

v.

The Income-tax Officer, Special Circle, Coimbatore .. *Respondent.*

Income-tax Act (XI of 1922), section 35—Scope of.

The return of an assessee included the dividends received from a particular company declared for a particular year of account of the company and the assessment order was based on that return. But during the same accounting year of the assessee he was deemed to have received another item of dividend from the same company. But there was no error in the assessment order in so far as the return submitted for that year was concerned. In the circumstances,

Held, that the non-inclusion of any item in a return leading to under-assessment could be rectified only by recourse to section 34 of the Income-tax Act and not to section 35 which is applicable only to cases of errors apparent from the record. Errors in assessment due to non-inclusion of income from an entire source or non-inclusion of certain items under a particular source are not errors rectifiable under section 35 of the Act. But where the original order of assessment was based on a particular assumption which is proved to be erroneous later it could be rectified by recourse to section 35 of the Act.

Petitions under Article 226 of the Constitution of India, praying that in the circumstances stated therein, and in the affidavits filed therewith the High Court will be pleased to issue a writ of *certiorari* calling for the Records in G.I. Nos. 33-m of 1946-47, dated 3rd September, 1951 and G.I. No. 52-s of 1946-47, dated 7th September, 1951 on the file of the Income-tax Officer, Special Circle, Coimbatore, respectively and quash the said orders.

K. R. Ramaswami for *M. Subbaroya Ayyar, V. Sethuraman* and *S. Padmanabhan*, for the Petitioner in all the Petitions.

C. S. Rama Rao Sahib, Special Counsel for Income-tax on behalf of the Respondent in all the Petitions.

The Court made the following

ORDER.—These three writ petitions raise for consideration the proper interpretation of section 35 of the Income-tax Act and are directed to question the legality of orders of the Income-tax Officer making additions under section 35 of the Act to the tax liability of the respective petitioners as determined by a completed assessment.

The questions raised in W.P. No. 886 of 1956 and W.P. No. 1006 of 1956 are common while the point to be considered in W.P. No. 1527 of 1956 is slightly different. I shall first proceed to consider W.P. Nos. 886 and 1006 of 1956.

Manickavasagam Chettiar and Sundaram Chettiar are respectively the petitioners in the two petitions. Both of them are shareholders in a private limited company by name the East India Corporation. These petitions are concerned with the assessment of these two individuals for the assessment year 1946-1947.

Both Manickavasagam's and Sundaram's assessments for the year in question were completed on 31st December, 1950. One of the sources of income disclosed in the returns and accepted by the Income-tax Officer was "dividends from companies" and among these were sums of Rs. 105 and 120 respectively which they had received as dividend from the East India Corporation. The company's year of account was that ended 30th June of each year. For the year ended 30th June, 1944, the company had declared dividends at a general body meeting in December, 1944. But the dividend was actually distributed and paid to the shareholders only on 3rd December, 1945. As a result of this distribution Manickavasagam received a sum of Rs. 105 as dividend and Sundaram Rs. 120. These sums were included by these two assessees in the returns which they submitted. These figures of Rs. 105 and Rs. 120 as dividends from this company were accepted by the Income-tax Officer who passed a final order of assessment on 31st December, 1950.

* W.P. Nos. 886, 1006 and 1527 of 1956. 12th November, 1957.

Proceedings had been taken against the East India Corporation under section 23 in respect of its distribution of dividend for the company's account year ended 30th June, 1945. The general body meeting of the company which passed the balance sheet for this year declared no dividends and it was the propriety of this act on the part of the general body that was canvassed in these proceedings against the company. On 28th February, 1950, the Income-tax Officer, Special (North Circle, Madras) passed an order and he declared,

> "that the undistributed portion of the company's assessable income for the year ended 30th June, 1945, less taxes thereon which has been worked out to be Rs.17,908 will be deemed to have been distributed as dividends among the shareholders on 31st December, 1945, the date of the General Body Meeting."

The amount due to have been received by each of these two petitioners who were shareholders in this company was computed by this officer as follows :—

Manickavasagam Chettiar	35 shares	Rs. 2,507.
Sundaram Chettiar	30 shares	Rs. 2,149.

It is common ground that the Income-tax Officer who completed the assessment of these two assessees on 31st December, 1950, accepting the returns as regards the quantum of dividends received by them was not aware of the order passed under section 23-A on 28th February, 1950. When however he was appraised of this fact he issued to these two assessees petitioners notices under section 35 seeking to rectify the assessment completed on 31st December, 1950, by the addition of Rs. 2,507 and Rs. 2,149 respectively. The assessees objected on various grounds, which included an attack on the legality of the order under section 23-A on the company based upon the constitutional invalidity of section 23-A itself. The Income-tax Officer overruled all these objections and made the additions which he proposed in the notices. The petitioners took the matter in appeal to the Assistant Appellate Commissioner. The appeal was dismissed on the ground, *inter alia*, that no appeal lay from an order under section 35. A further appeal to the Tribunal met with the same fate and an attempt by the petitioners to have a reference to this Court of the points involved under section 66 (1) of the Act also failed. After all these proceedings before the departmental authorities and the Tribunal, the petitioners have now approached this Court with the petitions now under consideration.

Most of the objections raised by the petitioners in challenge of the validity of the order under section 35 have now disappeared and the only contention now urged, as I already stated in the opening, is whether on a proper construction of section 35 of the Income-tax Act the jurisdiction of the officer extended to the correction of the assessment which he effected by the order now impugned.

The reasoning upon which the Income-tax Officer passed his order which was sustained by the Appellate Assistant Commissioner and the Tribunal (though as I stated before the latter two upheld a preliminary objection by the department to the maintainability of the proceedings before them) was briefly this : The assessees had included in their returns the dividends received by them from the East India Corporation during the year of account. The sums which they had included were only Rs. 105 and Rs. 120. Even before the date of the final order of assessment 31st December, 1950, the Income-tax Officer had on 28th February, 1950, passed an order under section 23-A on the East India Corporation. By reason of that Order the shareholders of the company were under the statute deemed to have received further sums noted against each in that year. It was because of the ignorance on the part of the Income-tax Officer who dealt with the assessments of these petitioners that the further sums of dividends statutorily deemed to have been received by the assessees were not included in the computation of their assessable income. This was a mistake apparent from the records within the meaning of section 35.

The correctness of this reasoning was disputed before me in these petitions. I will however premise the discussion as to the scope of section 35 by referring to one fact which had escaped the attention of the departmental authorities and the Tribunal in dealing with this matter. The dividends of Rs. 105 and Rs. 120 re-

ceived from the East India Corporation disclosed in their returns and included in the assessments were dividends declared by the Company for the Company's account year ended 30th June, 1944, whereas the order under section 23-A was in relation to declaration of dividends for the next account year ended 30th June, 1945. I am pointing this out even at this stage because if what was included in the assessment was one particular item of income and the "record" before the Income-tax Officer disclosed a mistake in that figure, the jurisdiction of the Officer to correct that mistake under section 35 would be undoubted. In the present case the facts are different. The figure of the dividends included by the assessees in their returns and in the assessment order, dated 31st December, 1950, had not undergone any alteration by reason of the order passed under section 23-A. On the other hand, the effect of the order under section 23-A was to add a new item of income " deemed " to have been received by the assessees during the assessment year 1946-1947.

To examine the legal position I shall first take a case where the entire source of income—say income from dividends is omitted in a return on the basis of which an assessment order has been passed. That omission might be wilful or inadvertent or might be due to the fact that it was not or could not be within the knowledge of the assessee. In the contingencies above referred to an assessee would be certainly under-assessed and generally speaking the provisions of section 34 would be attracted. One thing however is clear that the under-assessment in such cases cannot be rectified by recourse to the provisions of section 35 and that would be so notwithstanding that the records of the assessment of the company might be before the department and these records would have disclosed the distribution of dividends to the shareholders. This position seems to be tacitly accepted in the orders of the departmental authorities and the Tribunal passed on the assessees in the present case. Indeed learned counsel for the department conceded that this would be so.

The next type of cases to be considered would be where the income from a particular source, namely, dividend is included in the return and in the assessment but there is an omission to include an item within that particular source. The case I have in mind is where the assessee's return discloses a receipt of devidends from companies but he does not include in it the dividend factually received from one particular company. In such cases the records of the assessment of the particular company concerned which might disclose a distribution of dividend might be before the officer and available to him but this cannot justify the rectification of the assessment under section 35 by including the dividend from this company. This could only be done by resort to the provisions of section 34. This position also I do not understand the learned counsel for the department to contest.

Next comes the case now on hand. The assessment order included dividends from a particular company for one particular account year of the company. There was no error or mistake or under-statement in regard to the figure relating to that year. As I already stated if there had been any error in regard to that figure this could have been rectified under section 35. But during the same account year of the assessee, the assessee had received or must be deemed to have received, another item of dividend from the same company. Both these cases of actual receipt or deemed receipt must stand on the same footing as regards error. Suppose during the same account year of the assessee he had received further dividends from the company in respect of a different account year of the company. The non-including of this item in the return and in the assessment would certainly lead to an under-assessment and could be rectified under section 34. In my opinion it cannot be rectified under section 35. I can see no sensible distinction between a case of an entire omission of dividend received from a particular company and one where one item of receipt from a particular company is disclosed but not another. From this it would follow that the same rule must govern a further "deemed" receipt of dividend from a company.

The only features of the case stressed by learned counsel for the department were two: (1) The order under section 23-A was passed on 28th February, 1950, long before the assessment order and if only the Income-tax Officer had looked into

the records of the company's assessment, the assessment would not have been passed without taking to account the dividend "deemed" to have been received. There is no doubt that factually it would be so. But this in my opinion is not determinative if the question whether the original order of assessment was vitiated by mistake apparent from the record. If this argument of learned counsel for the department were to prevail, the same rule would apply to cases where no income from dividend was included in the original assessment order, a position however which learned counsel for the department did not assert. I therfore consider that though plausible this contention deserves to be rejected.

The second point urged was that the present assessees had been expressly named in the order under section 23-A on the East India Corporation as having received the dividends and that it was therefore the statutory duty of the Income-tax Officer dealing with the assessments of the present petitioners to correct the discrepancy between the two records—the present assessment orders, dated 31st December, 1950, which did not include the "deemed" income and the order under section 23-A, dated 28th February, 1950. This argument, in my opinion, is merely another form of the argument which I have just now dealt with. Mr. Rama Rao Saheb referred me to the decision of the Privy Council in *Commissioner of Income-tax* v. *Khemchand Ramdas*[1], and urged that on the passing of the order under section 23-A the basis of the assessment orders, dated 31st December, 1950, underwent a modification and that the Income-tax Officer in passing his orders under section 35 was merely giving effect to that modification. I am afraid that this decision cannot help the Revenue in the present case. The basis of the assessment orders, dated 31st December, 1950, was that for the account year of the East India Corporation ended 30th June, 1944, the assessees had received dividends amounting to Rs.105 and Rs.120 during their account year. There was no error in this and this figure of the dividend never underwent any change. What happened however was that the Company was "deemed" to have declared dividends during its account year ended 30th June, 1945. The assessees had included no portion of this dividend in their returns and naturally so, because at the general body meeting of the East India Corporation at the end of 1945, no dividends were declared. No doubt during the assessees account year they had disclosed a receipt of dividends from the company for the latter's account year ended 30th June, 1944. If the date of the declaration of the dividend at the general body meeting were to be the test for determining the date when the shareholder should be held chargeable with the receipt of the dividend, the dividends received for the account year ended 30th June, 1944, would have gone over to the assessees' earlier assessment year. But evidently since the company actually paid the dividends much later than the date of the declaration and the assessees included this dividend as having been received during their account year the concerned assessment year being 1946-47. It is not now necessary to consider whether the attribution of the dividend in the assessment of the assessees for 1946-47 proceeds on a correct interpretation of section 16 (2) of the Income-tax Act. But what I am concerned to point out is, that the inclusion of this dividend in the assessees' assessment for 1946-47 cannot obscure the fact that it was a dividend which related to an account year of the company which was unaffected by any order under section 23-A. In my judgment therefore the error that there was in the assessment orders, dated 31st December, 1950, with which these two petitions are concerned was not one rectifiable under section 35 of the Act.

The result is that these petitions are allowed and the rules are made absolute. There will be no order as to costs.

W.P. No. 1527 *of* 1956.—The facts in this case are different from those in the petitions I have just now dealt with. The petitioner Sundaram Chettiar is the same as the petitioner in W.P. No. 1006 of 1956. The case is concerned with the assessment of the petitioner for 1947-48. The petitioner was a shareholder in several private companies including one by the name of Sudaram & Co., Ltd., in which he was a major shareholder. At the time of the petitioner's assessment the assessee declared

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1. (1938) 2 M.L.J. 115: L.R. 65 I.A. 226: I.L.R. (1938) Bom. 487: 1938 I.T.R. 413 (P.C.).

that no dividend from these companies was included in his return because such dividends had not been declared. Even at that stage, the taking of proceedings against these other companies including Sundaram & Co., Ltd., under section 23-A of the Act was under contemplation. In view of this the assessee agreed to the completion of his assessment on the basis that if any order was passed under section 23-A against these other companies the assessment then completed might be rectified by including such sums as would be deemed to have been received by the petitioner as a result of such orders. The assessment order contained this reservation in these terms :

> "The assessee is a shareholder in a number of private companies. It is likely that the provisions of section 23-A of the Act will apply in the case of some of these companies and the undistributed profits of these companies will be deemed to have been distributed to the assessee during the account year ended 31st March, 1947. The assessee's representative has agreed that if the provisions of section 23-A of the Act are invoked in the case of private companies the assessee will have no objection to the assessment for 1947-48 being revised later on irrespective of time limit".

On this basis the assessment was completed on 30th November, 1951. As contemplated an order under section 23-A was passed against Sundaram & Co., Ltd., on 18th March, 1952. According to that order, a sum of Rs. 43,959 was deemed to have been distributed as dividends, among the shareholders of Sundaram & Co., Ltd., on 24th December, 1946 (the date of the general body meeting of the company) from out of the profits of the year ended 30th June, 1946. The assessee's share of the dividend thus deemed to have been received was Rs. 36,633 net which when grossed amounted to Rs. 53,284. On this being communicated to the Income-tax Officer dealing with the assessment of the petitioner he issued a notice on 8th April, 1953, calling for objections as to why the assessment should not be rectified under section 35. The assessee objected to the rectification on various grounds. But the Income-tax Officer overruling these objections passed an order on 30th June, 1953, rectifying the assessment as proposed. In this case also the petitioner filed similar appeals and took other steps as have been mentioned in W.P. No. 1006 of 1956 and these further proceedings ended in the same manner. He has now approached this Court with this petition under Article 226 of the Constitution.

Two points of difference might be noticed between the petitions just now dealt with and W.P. No. 1527 of 1956. The first relates to the order under section 23-A being passed subsequent to the date of the assessment order against the petitioner. If as I have held the existence of an order under section 23-A even on the date of the assessment did not by itself justify the rectification under section 35 the present case appears to be *a fortiori*. On the date when the order of assessment was passed, it was right. The fact that by reason of subsequent events the assesse was deemed to have been in receipt of other income not included in the original assessment would not be a ground for reopening an assessment which on the date it was made was correct.

But this cannot carry the petitioner to the full length necessary to succeed in this petition. This is because even at the date of the order of assessment both the assessee as well as the assessing officer were alive to the possibility of an order under section 23-A on the private companies in which the assessee held a controlling interest and it was as a result of the recognition of this fact that the reservation I have extracted earlier was made The question I have now to consider is the legal effect of this state of affairs. It is no doubt true that on the scheme of the Indian Income-tax Act there cannot be piecemeal assessments. This is far from saying that where the basis upon which an assessment proceeds is later found to be erroneous it cannot be rectified by recourse to section 35. In regard to this point I consider the submission of learned counsel for the department relying on the principle of the decision of the Privy Council in *Khemchand's case*[1], to have force. In *Khemchand's case*[1], the basis of the original order of assessment was that the assessee was a registered firm and it was because of such an assumption that no super-tax was levied in the original order of assessment. Subsequently, however, that basic fact ceased to exist by reason of an order cancelling registration of the firm. If the firm was unregistered

1. (1938) 2 M.L.J. 115 : L.R. 65 I.A. 236 : 1938 I.T.R. 414 : I.L.R. (1938) Bom. 487 (P.C.).

the assessee was bound to pay super-tax. The Privy Council held that the failure to impose super-tax in the altered circumstances was a mistake which could be rectified under section 35 within the time limited by the provision. Their Lordships said :

"In their Lordships' opinion, the case clearly would have fallen within the provisions of section 35 had the Income-tax Officer exercised his powers under the section within one year from the date on which the earlier demand was served upon the respondents. For, looking at the record of the assessments made upon them as it stood after the cancellation of the respondent's registration—and the order effecting the cancellation would have formed part of that record—it would be apparent that a mistake had been made in stating that no super-tax was leviable."

I consider that the principle of this decision applies to the facts of this case. The common understanding and the basic assumption on which the assessment order, dated 30th November, 1951, proceeded was that no order under section 23-A would be passed on companies in which the petitioner was a shareholder relative to the assessment year 1947-48. On that basis when an order under section 23-A was passed on Sundaram & Co., there was a mistake apparent from the record within the meaning of the ruling in *Khemchand's case*[1]. I therefore hold that the Income-tax Officer was within his jurisdiction in rectifying the error under section 35.

The result is that the petition is dismissed and the rule *nisi* discharged. In view of the order as to costs passed in W.P. Nos. 886 and 1006 of 1956 there will be no order as to costs in this petition also.

R.M. ——— *W.P. Nos.* 886 *and* 1006 *of* 1956 *allowed and W.P. No.* 1527 *of* 1956 *dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE BALAKRISHNA AYYAR.

The State of Madras represented by the Collector of Tanjore and others .. *Appellants**.

Madras General Sales Tax Act (IX of 1939), *section* 17 (2)—*Applicability—Protection under—If applies to reckless acts of officers.*

Section 17 (2) of the Madras General Sales Tax Act, 1939, is intended to protect cases of officers acting under the Act under an erroneous view of the law or where they proceed in the belief that certain facts exist which justify that action though later on it turns out that the facts are different. The section cannot be invoked in cases of reckless exercise of authority when there is a total want of *bona fides*.

Where the officers of the Sales-tax Department illegally attach the private property of the President of an Association registered under the Societies Registration Act, for recovery of tax due by the Society the attachment is illegal and would give rise to a claim for damages.

Appeal against the decree of the Court of the Subordinate Judge, Mayuram, in Appeal Suit No. 14 of 1956, preferred against the decree of the Court of the District Munsiff of Sirkali in Original Suit No. 20 of 1955.

The Government Pleader (*B. V. Viswanatha Ayyar*), for Appellants.

The Court delivered the following

JUDGMENT.—In 1946 the proprietors of some hotels in the town and taluk of Sirkali constituted themselves into an association called the Sirkali Taluk Hotel-Keepers Association, with the object of setting up an organisation that would *inter alia* effectively represent their grievances to the authorities. The Association was registered under the Societies Registration Act. Subramania Ayyar, the plaintiff, was the first elected president of the Association till some time in 1951 when he resigned. While the plaintiff was the president of the Association it purchased various commodities necessary for the business which its members were carrying on and distributed the articles among them. In respect of such purchases and sales the Association was assessed to tax under the Madras General Sales Tax Act for the years 1950-1951 and 1951-1952. The officers of the Department were unable to

1. (1938) 2 M.L.J. 115 : L.R. 65 I.A. 236 : (1938) I.T.R. 414 : I.L.R. (1938) Bom. 487 (P.C.)

* S.A. No. 874 of 1957. 15th November, 1957.

collect the tax from the Association. The Assistant Commercial Tax Officer then wrote to the second defendant who was the Special Deputy Tahsildar to collect the arrears of tax from the Association.

On 26th August, 1954, defendants 2, 3 and 4 went to the premises of the plaintiff, attached a cash box which contained a sum of Rs. 283-11-0 and took it away. The money and the box were the separate property of the plaintiff. The plaintiff complained to the Collector of Tanjore that the attachment was illegal but he got no redress from that officer and so he filed a suit for damages against defendants 1 to 4. Of these the first defendant is the State of Madras represented by the Collector of Tanjore, the second defendant is the Deputy Tahsildar who effected the attachment; the third defendant is a person who accompanied the second defendant and the fourth defendant is the local village Munsiff. The District Munsif dismissed the suit.

On appeal the learned Subordinate Judge allowed the appeal and granted declaration that the attachment made on 26th August, 1954, is illegal and improper. He also gave a decree in favour of the plaintiff directing the first defendant to return the attached property. He also awarded a sum of Rs. 25, as damages against the second defendant. The rest of the claim as against defendants 3 and 4 was dismissed.

Defendants 1, 2 and 3 have preferred this appeal.

I may at once dispose of a question of fact which was mentioned to me. It was suggested that the plaintiff handed over the cash voluntarily, and, in support of that suggestion I was referred to the evidence of D.W. 1. But reading the evidence as a whole I do not get that impression at all. No doubt the plaintiff voluntarily produced the box and opened it, but it is perfectly clear that he objected to the attachment. The evidence of the witness is that the officer advised the plaintiff to avoid distraint by paying the tax. But the plaintiff said that he would do no such thing and in effect dared him to go on with the attachment; far from surrendering the property voluntarily he had in fact entered an indignant protest to the entire proceedings.

The learned Government Pleader argued that the objects of the Sirkali Taluk Hotel Keepers' Association do not come within the scope of section 20 of the Societies Registration Act, that in consequence the Association could not have been registered under the Act, that as a further consequence it became a partnership consisting of all its members and that by reason of this consequence, the properties of the plaintiff who was a member of the Association could be attached to realise a debt due from the Association. I shall assume for the moment that the Association could not have been registered under the Societies Registration Act. But, granting that, I am not able to follow by what legal process the Society became a partnership and its members partners of one another. Leaving out the case of minors and junior members of a joint family, a partnership is created by a conscious contract between the parties. "A partnership can be created only by an agreement the object of which is to share the profits of a business carried on by all or any of them acting for all." (*Vide* section 4 of the Partnership Act.) The very circumstance that the Society was registered under the Soceities Registration Act is inconsistent with any agreement or intention to share its profits. I am not, therefore, prepared to agree that because the registration under the Societies Registration Act was invalid or improper, it had the effect of constituting the members of the society into a partnership. From this, it follows that the attachment was illegal: Government are in wrongful possession of the property of the plaintiff and they must give it back to him.

It was next argued that in any case the suit is bad by reason of section 17 (2) of the Madras General Sales Tax Act. The argument of the learned Government Pleader is that this section confers complete and comprehensive protection on the defendants in this case. It seems to me that the argument extends the scope of the protection conferred by section 17 beyond all reasonable and legitimate limits. Human activities are various and diverse. Doubts frequently arise whether any part of the Act applies to particular situations, and, if so, to what extent. Officers of Government who have got to administer the Act may proceed in the belief that

certain facts exist, but later on it might turn out that the facts were different. They may also be acting under an erroneous view as to the scope of the law. The section is intended to confer protection in such and similar cases and cannot be invoked in cases of reckless exercise of authority when there is a total want on *bona fides*. If the argument of the learned Government Pleader were right, it would be open to the officers of the Sales-Tax Department arbitrarily to take away the property of "A" to realise arrears of sales tax due from "B" and "A" cannot have the protection of the Courts. I enquired of the learned Government Pleader whether in this particular case the second defendant had acted under the advice of the local Government Pleader and I was told that he had not. The evidence of D.W. 1 which the learned Government Pleader placed before me suggests that the plaintiff was angry and protested angrily. In effect, he dared the second defendant to attach his property and the second defendant dared. He must have been perfectly aware that he had no authority to do what he did.

In the circumstances, I am not prepared to hold that section 17 applies to the facts of this case. The Second Appeal is dismissed.

R.M. ——— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE BALAKRISHNA AYYAR.

V. Kuppuswami and others .. *Petitioners**

v.

Sri Subramaniaswami Devastahanam at Tiruvidakkazhi by its Trustees Kanakasabhai Pillai and Muthuramalinga Chettiar and others .. *Respondents**

Madras Cultivating Tenants Protection Act (XXV of 1955), *section* 6-*A—Transfer of suits by Civil Court—When could be made—Cultivating tenant entitled to the bene fits of the Act—Scope of.*

It is no doubt true that section 6-A of the Madras Cultivating Tenants Protection Act, 1955, as amended by Act XIV of 1956 provides for transfer of certain suits from Civil Courts to the Revenue Courts established under the Act. But having regard to the scheme of the Act and the language of the section before a Civil Court can transfer a preceeding under section 6-A of the Act, it must be satisfied that the tenant is not only a cultivating tenant as defined by the Act ; he should also be entitled to some benefit or other under the Act. If both these conditions are not satisfied, no question of any transfer under section 6-A of the Act will arise. It may be that in coming to a conclusion whether a suit has to be transferred or not the Civil Court may have to determine certain questions which are exclusively within the jurisdiction of the Revenue Courts under the Act. But this cannot affect the interpretation of the specific words of the section, *viz.*, "cultivating tenants entitled to the benefits of the Act".

Quaere : Whether in view of the expression 'benefits of the Act' used in the plural, it is necessary that the tenant should be entitled to all the benefits of the Act before he could seek a transfer under section 6-A ?

Petition under section 115 of Act V of 1908 praying the High Court to revise the order of the Court of the Subordinate Judge of Mayuram, dated 1st July, 1957 and made in I.A. No. 622 of 1956 in O.S. No. 41 of 1956.

G. R. Jagadisan and *T. S. Srinivasan*, for Petitioners.

R. Gopalaswami Ayyangar, R. Pitchai and *K. Natarajan*, for Respondents.

The Court delivered the following

JUDGMENT.—O.S. No. 41 of 1956 on the file of the Subordinate Judge, Mayuram, is a suit by the trustees of the Subramaniaswami Devasthanam at Thiruvidakkazhi and a person named Muhammad Ali claiming to be a lessee from the devasthanam, for the issue of an injunction to restrain the defendants from interfering with the plaintiffs' possession of the suit properties.

Thirty three persons were impleaded as defendants in the suit. On behalf of all of them the first defendant filed a written statement in which, among other

* C.R.P. No. 1490 of 1957. 21st January, 1958.

things, the plea was taken that, only the revenue Court had jurisdiction to try the suit. On 21st November, 1956 the defendants filed I.A. No. 522 of 1956 praying that O.S. No. 41 of 1956, be transferred to the file of the Revenue Divisional Officer, Mayuram. The transfer was asked for on the basis of section 6-A which was introduced into Madras Act XXV of 1955 by Madras Act XIV of 1956. To that section I shall return presently. The learned Subordinate Judge dismissed the application. The defendants have therefore come to this Court.

Section 2 (*a*) of the Act defines the expression 'cultivating tenant'. Three classes of persons are included in that definition : (1) a person who carries on personal cultivation under any tenancy agreement, (2) any person who holds over and continues in possession after the determination of the agreement of tenancy and (3) the heirs of such persons. Section 3 prohibits landlords from evicting cultivating tenants, but this prohibition is subject to certain limitations. One of them is this. If the tenant is in arrears with his rent at the commencement of the Act and does not pay those arrears within six weeks after the commencement of the Act, he loses the protection against eviction. Similarly in respect of arrears accruing after the commencement of the Act the tenant loses his right of not being evicted if he fails to pay the rent within a month of its becoming due. Then follow other provisions enabling these rights to be worked out but they are not at present relevant. Under section 4 of the Act a cultivating tenant who has lost his possession is given a right to be restored to possession under certain circumstances. The nature of that right and the limitations attached to that are also set out in section 4. Section 4-A confers on a landlord the right to resume the land for personal cultivation under certain circumstances. Then there is section 6-A which runs as follows :

> " If in any suit before any Court for possession of, or injunction in relation to, any land, it is proved by affidavit or otherwise that the defendant is a cultivating tenant entitled to the benefits of this Act, the Court shall not proceed with the trial of the suit but shall transfer it to the Revenue Divisional Officer who shall thereupon deal with and dispose of it as though it were an application under this Act and all the provisions of this Act shall apply to such an application and the applicant."

The question I have to determine here is what do the words "cultivating tenant entitled to the benefits of this Act" mean ? It will be noticed that the word 'benefits' is in the plural and therefore if some one were to say that before a cultivating tenant can call in aid section 6-A he must be entitled to all the benefits under the Act or to more benefits than one under the Act, he would not be running counter to the rules of grammar. But since that contention has not been raised before me I need not go into it.

Mr. Jagadisa Aiyar argued that in the context the expression " cultivating tenant entitled to the benefits of this Act" only means a cultivating tenant as defined by the Act. His reasoning was this. If you hold otherwise and say that before he can call in aid section 6-A a cultivating tenant must be actually entitled to the benefits of the Act then it means that the cultivating tenant will have to plead, allege and prove what particular benefit or benefits he is entitled to under the Act. Now the jurisdiction in respect of such matters is conferred by other portions of the Act exclusively on the revenue Courts. If this construction is not adopted a civil Court will be called upon to adjudicate on matters which are exclusively reserved for the revenue Courts.

There is no doubt force in this criticism but then, the question naturally arises why did the Legislature add the words "entitled to the benefits of this Act" if it merely intended to say cultivating tenant as defined by the Act. When the Legislature has used certain words I shall not ordinarily be justified in ignoring them. Therefore before the civil Court can transfer a proceeding under section 6-A to the revenue Court it must be satisfied that the tenant is not merely a cultivating tenant as defined in the Act but also entitled to some benefit or other under the Act.

In the present case there are as many as thirty-three defendants and no attempt appears to have been made to find out individual by individual which of these defendants satisfies both these requirements of section 6-A, *viz.*, (1) that he is a culti-

vating tenant and (2) that he is entitled to some benefit or other under the Act. The learned Subordinate Judge will go into this matter and consider in respect of each defendant whether he satisfies both these requirements. In respect of those defendants who satisfy both the requirements, the suit will have to be transferred to the Revenue Divisional Officer.

In respect of those defendants who do not satisfy both these requirements the suit will have to go on before the Sub-Court. There will be a direction accordingly.

R.M. ——— *Direction accordingly.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE PANCHAPAKESA AYYAR.

Srinivasa Perumal Naicker .. *Petitioner**

v.

Thayammal *alias* Mangammal .. *Respondent.*

Civil Procedure Code (V of 1908), Order 41, rule 5—Stay of suit—Suit by wife against husband for her own maintenance and for that of minor children—Subsequent petitions by husband for custody of children and for restitution of conjugal rights—If ground for stay of maintenance suits.

Practice—Duty of Court not to make observations on merits of pending proceedings.

Maintenance suits ought not to be stayed except on the clearest ground of necessity or law; persons seeking maintenance, being needy persons, staying such suits, without providing for their maintenance, might even result in their death by starvation.

Where a Hindu wife institutes suits against her husband for her maintenance and for the maintenance of her minor children, and subsequently the husband applies for the custody of the minor children under the Guardians and Wards Act, and also applies for restitution of conjugal rights against his wife, the suits for maintenance filed earlier by the wife ought not to be stayed on the ground that the husband has subsequently filed petitions for the custody of the minor children and for restitution of conjugal rights.

It would be proper for the Court to refuse to stay the maintenance suit ; but in refusing to stay the suits, it would be inexpedient to make any observations on the merits of the proceedings pending between the parties ; it must take care to avoid any prejudice that might be caused by unnecessary observations on the merits.

Petitions under section 115 of Act V of 1908 praying the High Court to revise the orders of the Court of the District Judge of Ramanathapuram at Madurai, dated 6th September, 1956 and made in I.A. Nos. 138 of 1956 and 137 of 1956 in O.S. Nos. 65 of 1956 and 18 of 1956 respectively (O.S. Nos. 158 and 138 of 1955, District Munsif's Court, Sattur.)

G. Ramanujam, for Petitioner.

K. S. Sankara Ayyar, for Respondent.

The Court delivered the following

JUDGMENT.—These are two petitions filed by one Srinivasa Perumal Naicker, for revising and setting aside the orders of the District Judge, Ramanathapuram, dismissing his applications for staying the trial of O.S. Nos. 138 and 158 of 1955 on the file of the District Munsif's Court, Sattur, filed by his wife against him, one for her own maintenance and the other for maintenance of her minor children. The ground given by him was that he had filed a petition under the Guardians and Wards Act in the District Court, Ramanathapuram, for the custody of the minor children, whose maintenance had been asked for in one suit, and he had filed another petition in the District Court, Ramanathapuram, for restitution of conjugal rights against his wife, who was claiming maintenance against him in the other suit. The learned District Judge considered the grounds urged by him to be totally inadequate for staying the earlier maintenance suits and dismissed his petitions. Hence these Civil Revision Petitions,

I have perused the records and heard the learned counsel on both sides. Mr. G. Ramanujam, learned counsel for the petitioner, urged that his grievance was not

* C.R.P. Nos. 1325 and 1326 of 1956. 12th September, 1957.

so much against the refusal to stay the two suits, as against certain observations of the learned District Judge in his order refusing the stay, namely, that the petitioner's petition for the custody of his children and for restitution of conjugal rights were *mala fide*, and that the decision in the maintenance suit filed by the wife would operate as *res judicata* in these two petitions filed by him in the District Court. He stated that if it were made clear that those observations would have no effect on the two Original Petitions filed by the petitioner and the petitioner saved from prejudice thereby, he had no grievance against the refusal to stay the suits themselves. I agree that those observations were inexpedient and unnecessary and hold that the petitioner seems to have been frightened by them, into filing these Civil Revision Petitions which are otherwise without merit. So they will not affect the petitioner in those two Original Petitions or other proceedings. Regarding the refusal of the stay of the suits themselves, I am of opinion that the refusal was proper. Those suits were filed earlier than the petitions for custody of the minor children and for restitution of conjugal rights. Besides, maintenance suits ought not to be stayed except on the clearest ground of necessity or law, since the persons seeking maintenance are needy persons, and staying the suit, without providing for their maintenance, might even result in their death by starvation.

These two Civil Revision Petitions deserve to be and are hereby dismissed with the above observations, but, in the circumstances, without costs.

P.R.N. ——— *Revision petitions dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE RAJAGOPALA AIYANGAR.

K. M. Abbu Chettiar .. *Petitioner**

v.

The Income-tax Officer, City Circle IV, Madras and another .. *Respondents.*

Income-tax Act (XI of 1922), section 18-A (1)—Mistake of the Income-tax Officer in fixing the date of instalments—Non-payment of advance tax—Whether penalty can be imposed.

The Income-tax Officer in issuing the notice requiring the assessee to pay advance tax made a mistake in fixing the dates on which the instalments of tax were payable and instead of specifying 15th September, 1954, 15th December, 1954 and 15th March, 1955, as the due dates mentioned the corresponding dates of the succeeding year. The assessee did not make any payment on 15th September, 1954 and for the default a penalty was imposed.

Held: In the circumstances, no penalty can be imposed for non-payment of tax unless the tax is in arrears and there is default and this can occur only when the date fixed for its payment is allowed to pass without payment.

Petition under Article 226 of the Constitution of India, praying that in the circumstances stated in the affidavit filed therewith, the High Court will be pleased to issue a writ of *certiorari* calling for the records relating to the levy of penalties on the petitioner in pursuance of the orders of the Income Tax Officer, City Circle IV, Madras, made in G.I.R. No. 250 (*a*) 55-56 dated 8th December, 1954 and in G.I.R. 250 (*a*) 55-56 of 18-A dated 17th January, 1955 levying penalties of Rs. 1,000 and Rs. 3,000 respectively and that of the Commissioner of Income-tax made in I.T.R. Nos. 453 of 1955 and 454 of 1955 dated 9th January, 1956, sustaining the penalty at Rs. 1,000 and quash the said orders.

S. Swaminathan, for Petitioner.

C. S. Rama Rao Sahib, Special Counsel for Income-tax on behalf of the Respondent.

The Court made the following

ORDER.—The question is whether the Income-tax authorities had jurisdiction to levy a penalty for non-payment of advance tax. The petitioner was an assessee already he having been assessed to tax in 1952-1953 and the Income-tax Officer

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* W.P. No. 386 of 1956. 1st November, 1957.

issued a notice under section 18-A (1) requiring the assessee to pay advance tax on the basis of the completed assessment. In issuing the notice however he made a mistake in fixing the dates on which the instalments of tax were payable and instead of specifying the 15th September, 1954, 15th December, 1954 and 15th March, 1955, as the due dates mentioned the corresponding dates of the succeeding year. The assessee did not make any payment on the 15th September, 1954 and for this default in payment, the Income-tax Officer imposed a penalty of Rs. 1,000 on the assessee. It is the correctness of this imposition of penalty that is challenged here. I am saying this because the other penalty of Rs. 3,000 imposed for non-payment of the December instalment has been set aside by the Commissioner of Income-tax.

In my judgment the petition has to be allowed. No penalty can be imposed for non-payment of tax, unless the tax is in arrears and there is default and this can occur only when the date fixed for its payment is allowed to pass without payment. If as is common ground the assessee was directed to pay only on 15th September, 1955, he cannot be held to have been in default for non-payment of the sum on 15th September, 1954. It might be that this was due to a mistake of the Income-tax Officer but if the assessee acts as he is directed, he cannot be held to blame for not acting as he was intended to act.

The petition is allowed and the rule made absolute. No costs.

V.S. ——— *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE SUBRAHMANYAM.

P. R. M. K. Muhammad Abdul Rahiman Marakayar .. *Petitioner**

v.

Peer Muhammad and others .. *Respondents.*

Civil Procedure Code (V of 1908), Order 14, rules 1 and 5 (2)—Issues—Duty of Court in framing—Suit for declaration of title to half share in properties—Defendants Contesting claim and pleading for dismissal of suit—Defendants having disputes inter se *but not seeking adjudication thereon—Issue as to shares of parties in property—Propriety—Refusal to strike out issue—Revision—Interference—Civil Procedure Code (V of 1908), section* 115.

Although in a suit for partition, properly so called, the shares of the several parties have to be ascertained, and an issue as to the shares of the several parties is usually raised, no such issue arises in a suit which is not properly one for partition but one for a declaration of the plaintiff's title to a half-share in certain properties as against the defendants who, as between themselves, have disputes of their own regarding their particular interests in the properties, but all of whom are alike interested only in seeing that the plaintiff's suit is dismissed and are not keen on their disputes being settled by the Court ; there is no principle of law or equity on which they should be compelled to have their disputes adjudicated and to have their shares determined and separated *inter se*, when they do not want a division of the properties to be immediately effected but are content to be in common enjoyment.

The contest in a suit of this kind ought properly to be limited to a determination of the rights of the plaintiff as against the defendants or sets of defendants. The Court should not therefore frame an issue necessitating the determination of the disputes as between the defendants *inter se*. An issue as to the shares of the parties in such a suit is improper and out of place and ought to be deleted.

Noor Mohammad v. *Zainul Abdin*, A.I.R. 1940 All. 399, referred to.

A Court framing such an issue in such a suit acts with material irregularity and its refusal to delete such an issue is erroneous and would be a good ground for interfering in revision under section 115, Civil Procedure Code.

Petition under section 115 of Act V of 1908 praying the High Court to revise the Order of the Court of the District Munsif of Ramanathapuram, dated 23rd February, 1956, made in I.A. No. 55 of 1956 in O.S. No. 20 of 1954.

T. R. Srinivasan, for Petitioner.

N. K. Ramaswamy, for Respondent.

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* C.R.P. No. 468 of 1957. 8th November, 1957.

The Court made the following

ORDER.—This is a petition to set aside the order passed by the learned District Munsif of Ramanathapuram in I.A. No. 55 of 1956 in O.S. No. 20 of 1954 on his file.

The suit was for a declaration that the plaintiffs were entitled to a half of the properties described in the plaint schedule and for partition and separate possession of that half share. When the suit was instituted, there were eleven defendants. They contested the plaintiffs' claim and said that they had no title to any portion of the plaint properties, that they had not been in possession of any part of the plaint properties within twelve years before suit and that they (the defendants) had been in possession adversely to the plaintiffs, of the entire plaint properties, for over the statutory period. On these pleas, issues were framed on 8th April, 1954. Subsequently, on the plaintiff's application, defendants 12 to 24 were added. They filed a written statement in which they also pleaded that the plaintiffs were not entitled to any portion of the plaint properties and that the plaintiffs had not been in possession of the plaint properties within twelve years before suit. They prayed in their written statement just as the defendants 1 and 2 had prayed in their written-statements, that the plaintiff's suit be dismissed. On that written statement being filed by defendants 12 to 24, the learned District Munsif framed the following issue on 7th November, 1955: "To what shares are the parties entitled?" Defendants 1 and 2 filed I.A. No. 55 of 1956 praying that that additional issue be deleted. The learned District Munsif held that the suit was for partition and that therefore the issue, "To what shares are the parties entitled?" was necessary. He dismissed the application of defendants 1 and 2. Against that order, the defendants 1 and 2 have preferred this Civil Revision Petition.

It is undoubtedly true, that, in a suit for partition properly so called, the shares of the several parties should be ascertained, a preliminary decree declaring their shares should be passed and a final decree effecting a division should be made. The learned advocate for the respondents cites *Noor Mohammad* v. *Zainul Abdin*[1], and the following passage is particularly relied on:

"It is necessary for me to draw attention once again to the fact that this is a partition suit. There is no mystery about a partition suit. It is simply a suit in which persons who are jointly entitled to an undivided property set in motion the processes of the Court to obtain a division of it in severality among themselves".

This suit does not properly fall within the definition of the expression "partition suit". This is not a suit by a person whose title to a share in some, at any rate, of the plaint properties is admitted and whose share in such properties has to be separated in order that such separate share might be put in his possession. This is a suit in which the plaintiffs pray for a declaration of title to a half share as against the defendants, who, as between themselves, have disputes of their own regarding their particular interests in the properties. Both sets of defendants, *viz.*, defendants 1 to 11 and defendants 12 to 24, are alike interested in seeing that the plaintiffs' suit is dismissed. Each set of defendants prayed that the suit be dismissed. The learned advocate for the respondents says, however, that he is not able to conceive of a partition suit in which the shares of the several parties would not have to be ascertained. Let us take a case where *A* and *B* are the real owners of a certain piece of property. There is dispute between them as to the shares they are respectively entitled to in the property, *A* claiming a three-fourth share whereas *B* says that *A* has only an one-fourth share. But they are content to be in common enjoyment and are not particularly keen about the dispute being settled by litigation or about the division of the properties being immediately effected. At that stage, *C* who fancies he has a claim to make to ownership of a half of the property, institutes a suit for a declaration of his title to a half share and for partition and separate possession of such share. It is impossible to see, on what principle of law or equity, in a suit so instituted by *C*, *A* and *B* should be compelled to have

1. A.I.R. 1940 All. 399.

their disputes adjudicated and to have their shares determined and separated *inter se*. That is not the kind of partition suit about which, in the words of Braund, J., there is no mystery. That, on the other hand, is the kind of suit in which the contest ought properly to be limited to a determination of the rights of *C* as against *A* and *B*. *A* and *B* would, in due course, after getting *C* non-suited, have their disputes settled out of Court, and, if that is not possible, have a suit instituted as between themselves for the determination of their rights and a division of the properties in accordance which such rights. In this case, where both sets of defendants wound up their written statements with the prayer that the plaintiffs suit should be dismissed and did not ask for a determination of their own shares, the District Munsif acted with material irregularity in the exercise of his jurisdiction in framing an issue necessitating the determination of the disputes which appear to exist *inter se* as between the defendants.

I find that the District Munsif erred in refusing to delete the additional issue framed on 7th November, 1955. The order is set aside. That issue is deleted. The suit will be tried on the following issues:

1. Are the plaintiffs entitled to a half share in the suit properties?
2. Have the plaintiffs acquired title by prescription?
3. Were the plaintiffs in possession of the suit properties within twelve years before suit?
4. Is the plaintiff's suit barred by limitation?
5. Are the defendants estopped from denying the title of the plaintiffs?
6. To what reliefs are the plaintiffs entitled?

The parties will bear their own costs in this Civil Revision Petition.

P.R.N. — *Revision Petition allowed—order set aside.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE PANCHAPAKESA AYYAR.

Mrs. Meena Y. Tarkas .. *Petitioner**

v.

University of Madras .. *Respondent.*

Constitution of India (1950), Article 226—Powers of High Court under—Scope of interference in the administration of autonomous bodies like a University

The Madras University is an autonomous body and the discretion given to it to recognise degrees of certain other Universities as equivalent to their own and to refuse recognition of degrees of certain other Universities cannot be interfered with by Courts of law. In such cases the mere fact that the University issued a hall ticket to a candidate under a mistaken impression of his or her qualification to appear for an examination, does not lead to any legal or equitable estoppel. But *prima facie* it is open to the Syndicate of the University to exempt individual cases from the operation of certain conditions or rules, if they are found to work unnecessary hardship. Though the Courts cannot interfere with the discretion of the University in such matters, the Courts have the power, if not a duty, to recommend in suitable cases to the University to reconsider their decision within the scope of their powers.

Petition under Article 226 of the Constitution of India praying that in the circumstances stated in the affidavit filed therewith the High Court will be pleased to issue a writ of *mandamus* or any other appropriate Writ directing the Respondent to admit the petitioner to take the B. T. Degree Examination by declaring that she is duly qualified under the Rules of the Madras University and under the provisions of the Madras University Act and the Ordinances thereunder to take the said examination.

Sivaswami, for Petitioner.

C. N. S. Chengalvarayan, for Respondent.

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* W.P. No. 512 of 1957. 11th November, 1957.

The Court made the following

ORDER.—This petition raises an interesting question. The facts are briefly these. The petitioner Mrs. Meena Y. Tarkas, is a graduate of the S. N.D.T. Women's University, Bombay. She took the G. A. Degree in that University in 1946-47. She came to Madras in 1947 and was appointed as the Head-mistress of the Gujarati Vidhya Mandir in 1952. Her employers wanted her to get B.T. degree so that she might be confirmed as Head-mistress. She applied for admission to the St. Christopher Training College, Vepery, Madras, in 1956 to the B. T. class. Under the rules of the University of Madras, and of the above college, which was affiliated to it, she had to submit the original diploma relating to the degree taken by her, the migration certificate from the Registrar of the University which conferred the degree, and the duration certificate from the Principal of the College where she underwent the degree course, on the first day of the admission to the College to enable the Principal to send the same to the University for confirmation. She submitted the above documents, and the Principal of the St. Christopher College then wanted her to produce proof that the degree obtained by her was recognisable by the University of Madras. At the instance of the Principal she obtained a letter from the Inter University Board to the effect that the degree of the S.N.D.T. Women's University, Bombay were eligible to be recognised by all the other Universities in India. She was then admitted to the B. T. Course. She was also allowed to take part in the practical examination of the B.T. in February, 1957. Subsequently a hall ticket with Register No. 1370 was issued to her entitling her to sit for the written examination of the B.T. beginning from 2nd April, 1957. When she was preparing to sit for the examination as per the hall ticket, suddenly on 29th March, 1957, the Principal of her College dropped a bomb shell by phoning to her that, as per the instructions received from the Deputy Registrar of the Madras University, she could not be permitted to sit for the B. T. examination commencing from 2nd April, 1957, as the qualifying examination passed by her, namely the G. A. Degree examination S.N.D. T. Women's University, was not recognised by the Madras University for the purpose of taking the B.T. degree. She was directed to return the hall ticket. In spite of her frantic efforts to get the authorities to reconsider that decision, and to allow her to sit for the examination, and in spite of her producing a very good certificate from the Principal of her College regarding her experience as a teacher, bright and pleasant manner, great industry, phenomenal love of children, and fund of original ideas, the University authorities would not relent. She could not sit for the B.T. examination in April, 1957. She wanted permission at least to sit for the September examination. She also applied for *individual exemption*, waiving the rigour of the rules. The Vice Chancellor regretted his inability to grant her individual exemption to sit for the B.T. examination on 19th April, 1957, and refused to reconsider the order. She then filed this writ petition.

Along with it she filed C.M.P. No. 4306 of 1957. Rajagopalan, J., as he then was, permitted the petitioner to apply to the University to sit for the B. T. examination in September. In C.M.P. No. 6189 of 1957, Rajagopala Ayyangar, J., directed the issue of a hall ticket to her by the University for sitting for the 1957, September examination, and directed her results to be withheld till the final orders in this writ petition, leaving all the contentions of the parties intact. She has accordingly sat for the examination in September, 1957, but the results have not come out, let alone her particular result directed to be withheld till the disposal of this petition.

I have perused the records, and heard the learned counsel for the petitioner and Mr. Chengalvaroyan, the learned counsel for the respondent, the University of Madras. Mr. Sivaswami for the petitioner, urged five grounds. The first was that the University was estopped from refusing her permission to sit for the B. T. degree in view of her completing her course and in view of her being given a hall ticket for sitting for the examination in April, 1957 causing immense injury to her by wasting her time, money, and energy. I cannot agree. There cannot be any *legal* or *equitable* estoppel in such cases. A mere *moral* estoppel, as in this case can only be a ground for a recommendation *ad misericordiam*.

The second was that the degrees of S.N.D.T. Women's University, having been recognised by the Inter University Board, should have been recognised by the Madras University for the purpose of the B. T. examination. I cannot agree. The Madras University is an autonomous body, and the discretion given to it to recognise degrees of certain Universities and to refuse recognition of degrees of certain other Universities cannot be interfered with by Courts. I need not therefore consider Mr. Chengalvaroyan's contention that the G.A. course in the S.N.D.T. Women's University is simpler and less onerous, than the Madras University's and that the recognition of the S.N.D.T. Women's University degrees by the Inter-University Board is not as complete as contended by Mr. Sivaswami.

The third contention was that the Madras University has recognised even the degrees of Hong-Kong-University, and that the degrees of the S.N.D.T. Women's University cannot be considered to be inferior to the degrees of the Hong-Kong University, and that this kind of *discrimination* should not be tolerated. I am afraid Article 14 of the Constitution of India will have no application to such questions of preference between the Hong-Kong University and S.N.D.T. Women's University for such purposes. This Court cannot interfere in the matter of such discretion given by law.

The fourth contention of Mr. Sivaswami was that the Vice Chancellor of the Madras University had no power to refuse *individual exemption* for sitting for the B.T. examination and that the Syndicate alone should have passed orders on her petition. I cannot agree, though I consider *prima facie* that the Syndicate can, if they like, *reconsi er* the orders in such matters passed by the Vice Chancellor, as conceded by Mr. Chengalvaroyan.

The last contention of Mr. Sivaswami was that this Court should recommend to the University to consider the desirability of exempting the petitioner *as an individual* from this condition for sitting for the B.T. examination *ad misericaridium*. Mr. Sivaswami urged that there was power vested in the Syndicate to exempt individuals from some of the conditions required for sitting for the B.T. examination just as persons who have no legal degrees can be enrolled as advocates, if they are otherwise found suitable and desirable by the Bar Council and Court, as in the case of Mr. R.M. Seshadri an advocate of this Court, and just as people without any degrees or even Collegiate education can be made *Doctors of Law* or Doctors of Letters or Philosophy by the University, if it seems fit in view of their eminence, public service or other qualifications. I am disposed to agree *prima facie* that the Syndicate has got such a power of *exempting individuals* inasmuch as such residuary power is reserved with almost all public bodies and the Vice Chancellor's own order refusing the petitioner's application for individual exemption does not say that it was refused because there *was no power* to do so. Mr. Chen alvaroyan was unable to convince me that the Syndicate has no such power. Mr. Sivaswami urged that the University authorities the Syndicate and the Vice Chancellor may be requested to consider the advisability of reconsidering the previous orders of refusal in case the petitione has done well in her September examination and is therefore found fit and suitable for exemption. This is a reasonable request, since the petitioner has not only undergone the full cou'se but has al o sat for the examination and is awaiting the results. Of course this Court has neither the power nor the intention to interfere with the discretion of the University in such matters. But just as it has got power to recommend to the Government, the commutation of a sentence which it has no power to reduce it must be deemed to have the power, and indeed the duty, to recommend in suitable cases like this, to the University to reconsider its orders, if it deems fit to do so, if there is power to e empt individuals if the actual performance of the petitioner in the examination warrants it. With that recommendation *ad misericardium* this petition is dismissed. In the circumstances, there will be no order as to costs. Advocate's fee Rs. 100.

R.M. *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE RAMASWAMI AND MR. JUSTICE SUBRAHMANAYAM.

Salem Municipal Council by .. *Appellant.*

v.

S. V. Subramanian .. *Respondent.*

Madras District Municipalities Act (V of 1920), section 354 (2)—Scope—Jurisdiction of Civil Court—When can be invoked to set aside assessment—Section 82—Annual rental value—Ascertainment of rent—General principles.

The Civil Court is not so to say a Court of appeal against the order of the assessing authority and once it is satisfied that the assessing auhority has exercised its judgment fairly on the materials placed before it and has come to a particular conclusion as to the annual value of the property, the jurisdiction of the Civil Court is ousted by section 354 of the Act. Thus, if the levy of tax by a local authority is within the framework of the Act and is in substantial compliance with the provisions of the Act the Civil Court has no jurisdiction to go into the question whether the levy is excessive or not. But it is equally well-settled that where the basis of the levy itself is wrong or there is no basis at all for the levy and in that sense there is no substantial compliance with the provisions of the Act, it is open to the Civil Court to declare the levy illegal and in fact it is its duty to do so.

Section 82 (2) of the Act lays down the method of arriving at the annual value of lands and buildings upon which property tax is levied. The annual value of a building should be arrived at taking into account all factors, necessary to find out what would be the probable rent of the building which a prospective tenant would be willing to pay for the building if let out. The rent can be ascertained by local enquiry, by examination of the rent receipts and by the statements and admission of the parties themselves. In the case of all properties the rent actually paid may be regarded as *prima facie* evidence of their annual value in the absence of rebutting evidence. In short the actual rents paid are a sure guide subject to two limitations, namely, they should be carefully scrutinised to see what services they include and wherever possible they should be checked by rents of similar premises in the locality.

In the absence of materials to show that during a period the rent actually received by the owner of the building had increased or that there were circumstances which changed that rental basis on the foot that the building could reasonably be expected to be let out on increased rentals, this would only be a case of enhanced assessment being made on no basis whatsoever justifying interference by the Civil Court and setting aside enhancement and directing a refund.

The probable rent for whole of the year must be the criterion and not any excessive rent received during a particular portion of a year and the hypothetical tenant is to be taken as the standard. A levy in disregard of this principle cannot be said to be within the scope of the provisions in section 82 (2).

The conduct of the person deducible from the revision and appeal petitions which he preferred though unsuccessfully clearly establishes that he never acquiesced in the enhancement of the tax. It must be held that the taxes were not paid voluntarily but were paid only under protest.

In practice when once a Court gives a declaratory relief that a levy made by a Municipality is illegal it is proper to assume that the Municipality will act in conformity with that declaration.

Appeal against the decree of the Court of the Subordinate Judge of Salem, dated 2nd January, 1953 in Original Suit No. 135 of 1951.

D. Ramaswami Ayyangar and *P. R. Varadarajan*, for Appellant.

S. Ramayya Nayak, for Respondent.

The Judgment of the Court was delivered by

Ramaswami, J.—This appeal and memorandum of objections arise from the decree and judgment of the learned Subordinate Judge of Salem in O.S. No. 135 of 1951.

The facts are. In Salem town there is a building, bearing door No. 34 in Arunachala Asari Street. It was constructed as a theatre in 1913 for use as a dramatic house and was later converted into a cinema house in 1926. This building originally belonged to Angappa Pillai and his nephew Velayudham Pillai the father of the respondent before us. Angappa Pillai was renting out the premises together with the machinery and furniture to Oriental Talkies at a daily rental of Rs. 20. In this Oriental Talkies Velayudham Pillai was a partner. In a family partition of the year 1943 this building fell to the share of Velayudham Pillai subject to the lease. Velayudham Pillai continued to be the lessor and has been receiving a

* Appeal No. 695 of 1953 and Memorandum of Objections. 15th November, 1957.

rental of Rs. 600 per month for the building machinery and furniture. Out of the said rental of Rs. 600 a sum of Rs. 150 is said to have represented the rental for the furniture Rs. 350, the rental for the machinery and Rs. 100 the rental for the building. On the foot of this rental the annual rental value in the Municipal Registers was calculated at Rs. 1,110 and the amount of assessment levied was Rs. 127-10-9. In 1947 the assessment was sought to be increased to Rs. 200. But Velayudham Pillai preferred an appeal to the Tax Appeal Committee and the said Committee restored the original assessment. Thus, including the scavenging tax, etc., the property tax levied upon this building upto 1948 was Rs. 133-3-3, for a half year.

On 28th February, 1948, the Commissioner of the Municipality issued a notice to Velayudham Pillai who died in 1950 only, under rule 10 of Schedule IV of the District Muncipalities Act, stating that the property tax for the said building was enhanced from Rs. 133-3-3 to Rs. 3,933 for the half year with retro-active effect from 1st October, 1946. This enhanced assessment was reduced Rs. 799-3-3 on a revision petition filed by Velayudham Pillai to the Commissioner. The assessee again preferred an appeal to the Council and the Tax Appeal Committee confirmed the assessment with effect from 1st October, 1946. In other words, the plaintiff's father notwithstanding this reduction had to pay under protest on 20th October, 1948, Rs. 1,998 over and above the sum of Rs. 133-3-3 per half year for the first half year of 1947-48, for the second half year of 1947-48 and for the first half year of 1948-49. The plaintiff who is the son of Velayudham Pillai is asking for a refund of this sum of Rs. 1,998.

For the second half year of 1948-49, Velayudham Pillai was served by the Municipality with a demand notice for payment of Rs. 799-3-3 on 13th December, 1948 and the said amount was also paid by him on 12th March, 1949. There is no dispute about it and no refund is asked for regarding the same.

Then for the second half year of 1948-1949 the Executive Authority got information according to them that the theatre was rented out for a dramatic troupe on a rental of more than Rs. 5,000 a month and purported to take action under rules 8 to 10 of Schedule IV of the District Municipalities Act and served a special notice on the assessee on 14th March, 1949, enhancing the assessment on the foot of the rental value of Rs. 5,000 per month. The assessment was fixed at Rs. 6,660 per half year on that basis. The special notice served on the assessee on 14th March, 1949, claimed the enhanced assessment from 1st October, 1948. The assessee filed a revision petition and the assessment was confirmed by the Commissioner. Thereupon he filed an appeal to the Council and the Council also confirmed the assessment made by the Commissioner. The plaintiff's father paid under protest the sum of Rs. 5,860-12-9 on 15th July, 1949, besides the sum of Rs. 799-3-3 paid on 12th March, 1949, for the second half year of 1948-1949. Another sum of Rs. 6,600 was collected from the plaintiff's father on 31st January, 1950, for the first half year of 1949-50. In regard to the payments relating to which refund of Rs. 1,998 is asked for and this sum of Rs. 5,680-12-9 the plaint categorically states that these amounts were paid under protest by Velayudham Pillai and this has not been traversed in the written statement filed by the Municiplity. The plaintiff claims a refund of the excess amounts of Rs. 5,860-12-9 paid for the second half year of 1948-49 and another sum of Rs. 5,860-12-9 paid for the first half year of 1949-50, totalling Rs. 11,721-9-6.

Subsequently, Velayudham pillai filed a revision petition on 31st August, 1949, under rule 11 of Schedule IV of the District Municipalities Act to reduce the tax *for the forthcoming half year*. That revision petition was considered by the Commissioner and he took note of the changed circumstances at the time of its disposal and reduced the assessment to Rs. 3,330 per half year based on the basis of a rental value of Rs. 2,500 per month. An appeal was preferred to the Council against the said order and the Council confirmed the assessment of the Commissioner. In regard to this, the plaintiff also claims the difference between Rs. 3,300 and Rs. 799-3-3 which according to him is the tax and which is imposable, *viz.*, refund of Rs. 2,530-12-9. Thus, the plaintiff sues under three heads for a total refund of Rs. 16,250-6-3.

The contentions of the Municipality are reflected in the following issues framed in the suit :—

1. Whether the assessments referred to in paragraphs 9 and 15 are illegal and arbitrary as contended by plaintiff, and whether provisions of District Municipalities Act have not been complied with ?

2. Whether plaintiff is entitled to claim refund of several amounts asked for ?

3. Whether the Civil Court has jurisdiction to try the suit ?

4. Whether the suit is validly and properly instituted by plaintiff ?

5. To what relief, if any, is plaintiff entitled ?

The learned Subordinate Judge came to the conclusion under issue 1 that the assessments referred to in paragraphs 9 and 15 of the plaint are not illegal and arbitrary except the assessment during the second half year of 1948-49 and the first half year of 1949-50 ; under issue 2 that the plaintiff is not entitled to claim refund of the several amounts asked for,except a sum of Rs. 6,660 out of the tax paid for the second half year of 1948-49 and the first half year of 1949-50; under issue 3 that in respect of the two half years for which the plaintiff is found entitled to get a refund, the Civil Court had jurisdiction to try the suit; under issue 4 that it should be answered in the affirmative and under issue 5 that the plaintiff was entitled to get a decree for sum of Rs. 6,600 with interest thereon at four per cent per annum from 2nd May, 1950, date of the notice of demand issued by the plaintiff, till the date of payment. The rest of the plaintiff's claim was dismissed and the parties were made to pay and receive proportionate costs. The Municipality has filed this appeal in respect of the sum decreed to the plaintiff and the plaintiff has filed a memorandum of objections in regard to his claim disallowed by the lower Court. In other words, the entire matter is at large before us.

On a review of the entire circumstances of the case, we have come to the conclusion that the plaintiff is entitled to the refund of Rs. 1,998 and Rs. 11,721-9-6 covered by paragraphs 9 and 15 of the plaint and that he is not entitled to the refund of Rs. 2,530-12-9 covered by paragraph 16 of the plaint. In other words the appeal by the Municipality has got to be dismissed and the memorandum of objections of the plaintiff except as regards the sum of Rs. 2,530-12-9 has got to be allowed. Here are our reasons.

The scope of the civil Court's interference in regard to the assessments levied by a Municipality when the aggrieved tax payer comes to the civil Court after exhausting the remedies provided under the Municipalities Act and the assessment has become final in so far as the department is concerned has now become really well-settled. The case-law on this subject has been summarized in a recent judgment of one of us reported as *Alli Ramanan*, In re[1]. The principles deducible from the long line of decisions of this Court summarised therein are: The Civil Court is not so to say a Court of appeal against the order of the assessing authority and once it is satisfied that the assessing authority has exercised its judgment fairly on the matrials placed before it and has come to a particular conclusion as to the annual value of the property, the jurisdiction of the civil Court is ousted by section 354 (2) of the District Municipalities Act which provides :

"No suit shall be brought in any Court to recover any sum of money collected under the authority of the Act or to recover damages on account of any assessment, or collection of money made under the said authority, provided that the provisions of the Act have been, in effect, complied with".

Thus, if the levy of tax by a local authority is within the framework of the Act and is in substantial compliance with the provisions of the Act, the Civil Court has no jurisdiction to go into the question whether the levy is excessive or not. But it is equally well settled that where the basis of the levy itself is wrong or there is no basis at all for the levy and in that sense there is no substantial compliance with the provi-

1. (1957) 70 L.W. 19.

sions of the Act, it is open to the Civil Court to declare the levy illegal and in fact it is its duty to do so.

Therefore, we have got to examine what should be the basis of the valuation of the property for arriving at the annual rental value on which assessment is made by the Municipality. Section 82, clause (2), of the District Municipalities Act lays down the method of arriving at the annual value of lands and buildings upon which property tax is levied by the Municipality. It provides that the annual value shall be deemed to be the gross annual rent at which the building may reasonably be expected to let from month to month or from year to year. It also provides that in the case of buildings ten per cent. of the annual rent should be allowed as deduction in lieu of allowance for repairs. It is clear from the authorities that the annual value of a building should be arrived at taking into account all factors necessary to find out what would be the probable rent of the building which a prospective tenant would be willing to pay for the building if let out. The rent can be ascertained by local enquiry, by examination of the rent receipts and by the statements and admissions of the parties themselves. In the case of all properties the rent actually paid may be regarded as *prima facie* evidence of their annual value in the absence of rebutting evidence. Similarly the fair rent fixed under the House Rent Control Act.[1] It will be a simple matter if there are a number of similar properties all let to different tenants, and particularly so when the owners are different. In such cases the average paid would be reasonable if the rents were of recent imposition; if all were not then the older should be eliminated and the newer used. In short the actual rents paid are a sure guide subject to two limitations, namely, they should be carefully scrutinised to see what services they include and wherever possible they should be checked by rents of similar premises in the locality. These propositions are well-established and need no buttressing up by citation of authorities.

In this case what was the basis for arriving at the annual value on which assessment was made can be gathered from Exhibits B-2 and A-3 Exhibits B-12, B-19 and B-32. Exhibits B-2 and A-3 cover the assessment dealt with in paragraph 9 of the plaint. Exhibits B-12 and B-19 refer to the assessments covered by paragraph 15 of the plaint and Exhibit B-32 refers to the assessment covered by paragraph 16 of the plaint. Exhibit A-3 following hard on the heels of the Municipal Council Tax Appeal Committee confirming the assessment at Rs. 133-3-3 on 5-3-47 on the grounds that the premises have not undergone any change or improvement and there has been no change in the rent paid and the lessees continued to be the same for over two decades (*Vide* Exhibit B-27) merely specified " Increases on rental value" as the ground for enhancement. In Exhibit B-12, the Commissioner arrived at the tentative conclusion that the annual rental value should be fixed at Rs. 60,000 on the foot that his information showed that the theatre had been leased out for a dramatic troupe that the lessee was paying Rs. 5,000 per mensem excluding the collections from beeda and tea shops, cycle stand fees, etc., which were being collected direct by the landlord of the theatre. In Exhibit B-19 the Commissioner has fortified himself with the following additional information. According to the account books produced by Velayudham Pillai for the period from October to end of December, 1948 the gross, receipts from the drama performances amounted to roughly Rs.21,000 odd for October Rs. 11,000 odd for November and Rs. 8,000 odd for December, and the share of the Oriental Talkies out of the toal collections amounted Rs. 4,885-12-9 for October, Rs. 2,431-15-0 for November and Rs. 1,793-12-3 for December, 1948. K.N. Muthukrishna Chettiar the other partner of the Oriental Talkies did not produce his account books before the Commissioner. K. R. Ramaswami, the proprietor of the Nataka Sabha, also failed to produce his account books before the Commissioner. The account books of Velayudham Pillai produced before the Commissioner showed that for January, 1949, the total amount received, representing 25 per cent. of the gross income was Rs.3,487 odd and the figure for February, 1949, was Rs.2,791 odd.

1. *Madurai Municipality* v. *Kamakshisundaram*, 68 L.W. 583 : (1955) 2 M.L.J. 369 : A.I.R. 1956 M. 49 [following A.I.R. 1951 Bom. 320 and Distinguishing A.I.R. 1927 Cal. 659 and 1 Rang. 668] and *A. S. Kuppusami Iyer* v. *Tirunelveli Municipal Council*, (1955) 2 M.L.J. 467: 1955 M.W.N. 727.

From the account books produced the Commissioner found that the figures given therein showing the income received by the Oriental Talkies during the five months did not correspond with the figures given in the personal ledger in the name of Velayudham Pillai. The Commissioner therefore declined to give any credence to the account books of Velayudham Pillai. He refers to the circumstance that K.R. Ramaswami himself told him on one occasion that the owners of the theatre demanded a monthly rent of Rs. 5,000 which he considered to be exorbitant and therefore he proposed to vacate the theatre. Therefore, the Commissioner came to the conclusion that in the circumstances he had no other alternative except to confirm the tenantive conclusion arrived at in Exhibit B-12. In consequence, taking the monthly rental to be Rs. 5,000 and adding to it the income received by the lease of beeda and tea stalls and cycle stand, which he estimated at Rs. 300 and setting off this sum of Rs. 300 against the rebate towards the rent of machinery and furniture in the theatre, he fixed the tax payable at Rs. 6,660 per half year.

In regard to the assessment covered by paragraph 16 of the plaint the Commissioner has in Exhibit B-32 made the following note :

"Party's agent (Advocate) comes and represents that now the theatre is run by owner and is not let out, the original assessment should be restored. Though this is not possible, yet considering the present fall in rental of all theatres and in view the fact that the theatre is smaller in dimensions than many others, but taking into account its size I reduce and fix the rental at Rs. 30,000."

In regard to the assessment covered by paragraph 9 of the plaint, we have already stated that the Municipal Council's Tax Appeal Committee on an appeal preferred before it had confirmed the assessment of Rs. 133-3-3 on 5th March, 1947, on the ground already set out. *viz*., that the premises had not undergone any change or improved and that there has been no change in the rental paid and that the lessees continued to be the same for over two decades. Exhibits B-2 and A-3 do not disclose any materials for this enhancement beyond merely begging the question, *viz*., the increase in rental value. In fact there is no evidence of any change between 5th March, 1947 and February, 1948, in order to justify the retroactive effect being given from 1st October, 1946. In the absence of a title of materials to show that during that period the rent actually received by the owner of the building had increased or that there were circumstances which changed that rental basis on the foot that the building could be reasonably be expected to be let out from month to month or year to year on increased rentals, this would only be a case of enhanced assessment being made on no basis whatsoever justifying interference by the Civil Court and setting aside the enhancement and directing a refund. This would dispose of the enhanced assessment challenged in paragraph 9 of the plaint.

Turning to the enhanced assessment in regard to which refund is asked for in paragraph 15 of the plaint, there cannot be the slightest doubt that the basis of the levy, *viz*., that the owner Velayudham Pillai was getting a rent of Rs. 5,000 per mensem was totally incorrect. First of all, this is a factual error. The Commissioner had before him the agreement of partnership, Exhibit A-21. That document clearly shows that the Oriental Talkies was to pay a monthly rental of Rs. 600 for the theatre as usual to the owner Velayudham Pillai. Then under the partnership formed for exploiting the building by putting on boards dramas by the Krishna Nataka Sabha, Velayudham Pillai and Muthukrishnan Chettiar two of the partners, were to receive 25 per cent of the takings *minus* certain charges on the foot of their contribution to the partnership, *viz*., Oriental Talkies placing at the disposal of the Krishna Nataka Sabha their entire staff, furniture, electric fittings, arc lamps, undertaking of the sanitary arangements, maintenance charge of furniture, etc. It is not the case for the Municipality that notwithstanding the sum of Rs. 600 being expressed as rental to the owner Velayudham Pillai, the real rental was something else. On the other hand, the Commissioner has equated the partnership profit as the rental for the building. This was sought to be supported on the ground of the Commissioner's proceedings Exhibit B-19 wherein he refers to the accounts and an alleged statement by K. R. Ramaswami. In the case of the former the accounts have been totally disbelieved by the Commissioner and therefore the accounts cannot be made the basis

for determining what was the actual rent paid by the Nataka Sabha to Velayudham Pillai. In regard to the alleged statement said to have been made by K. R. Ramaswami it is not clear whether that gentleman was thinking of the entire amount which had to be paid to Oriental Talkies or the rent payable to Velayudham Pillai. It was a factual error therefore on the part of the Commissioner to have equated the partnership profits with the rental. Then, even assuming for the sake of argument that for a few months a sum of Rs. 5,000 was realised by letting out the theatre for dramatic performances, this income which is almost in the nature of a windfall could not have been taken as the normal income earned from the property throughout the year. In fact in this very case as pointed out by the learned Subordinate Judge:

> " but for this interlude of dramatic performances the monthly income from the theatre could not have reached the figure of Rs. 5,000 is amply established by the circumstance that on an application by Velayudham Pillai the property tax was reduced with effect from the second half-year of 1949-50 to one half of the tax levied in the two preceding half-years."

The terms of clause (2) of section 82 have already been reproduced. It is clear from the decisions which will be referred to presently that two principles guide such assessments. The first is that the probable rent for the whole of the year must be the criterion and not any excessive rents received during a particular portion of the year. Secondly, the hypothetical tenant taken as the standard in these cases of the continuation of his lease. These principles are deducible from the decision of this Court under section 23 of the City of Madras Municipal Act of 1884, *Secretary of State* v. *Madras Municipality*[1], and the same question which arose with reference to assessment to property tax of certain salt works situated in Aden, decided by the Bombay High Court in *Abdullabhai Lalji* v. *Executive Committee, Aden*[2], and under section 9 (2) of the Indian Income-tax Act, whereunder the annual value of the property has to be ascertained, *viz.*, *D. M. Vakil* v. *I.T. Commissioner*[3]; *Jamnadas* v. *I.T. Commissioner*[4] and *Narayan Chandra* v. *Chairman, Municipal Commissioners, Panihatti*[5]. See also *Brahmayya* v. *Guntur Municipal Council*[6]. Therefore, when the Commissioner disregards the principle that excessive rents received for a certain time should not be taken into consideration in deciding the annual value of the property, the Municipal assessment cannot be said to be in terms of clause (2) of section 82 of the Act.

The ground specified for increasing the rental value was nothing more than a mere formula for levying enhanced tax. It is not based upon any one of the known grounds for calculating the rental value. We have already set out above the materials which could be considered. The actual rents received by the owner of the building during the year in question should be taken into account. This has not been done. The decision in *Globe Theatres* v. *Chief Judge of Small Causes Court*[7], dealing with the valuation of a cinema theatre for the purpose of assessment to property tax under the Bombay Municipal Act lays down that besides the test of actual rent received or rent of similar theatre in the city, the value could be arrived at a percentage of the net profits earned from the theatre for the year in question. This is not the basis adopted by the Commissioner in this case. The decision in *Calcutta Corporation* v. *Bengal Province*[8], has held that under the Calcutta Municipal Act III of 1923 for the purpose of arriving at the annual value of buildings for levying property tax evidence afforded by return or assessment of neighbouring premises was admissible and could be taken into account by the assessing authority. This was not also the method adopted by the Commissioner in this case. We therefore agree with the learned Subordinate Judge who has held that the Commissioner disregarded the mandatory provisions of section 82 of the Act when he fixed the annual letting value of the theatre on the assumption that a rent of Rs. 5,000 per mensem could be received for the whole year. On this conclusion it follows that this enhancement was illegal, *ultra vires* of the powers of the Executive Authority of the Municipal Council.

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1. (1886) I.L.R. 10 Mad. 38.
2. (1918) 46 Ind. Cases 781.
3. A.I.R. 1946 Bom. 350.
4. A.I.R. 1951 Bom. 438.
5. A.I.R. 1930 Cal. 38.
6. (1926) M.W.N. 680 : 24 L.W. 212 : A.I.R. 1926 M. 1007.
7. A.I.R. 1947 Bom. 108.
8. A.I.R. 1940 Cal. 47.

Therefore the plaintiff is entitle to the relief asked for, *viz.*, the refund of the amount claimed in paragraph 15 of the plaint.

Before parting with this portion of the case, we are bound to notice the contention of Mr. D. Ramaswami Ayyangar which was advanced in the lower Court also and repelled by the learned Subordinate Judge, *viz.*, that these amounts of tax were paid by the father of the plaintiff voluntarily without protest and that therefore no relief could be given to the plaintiff. We agree with the finding of the learned Subordinate Judge, Mr. Ganapatia Pillai (now Justice) on this point.

"The next question for consideration is whether the amounts of tax paid by the father of the plaintiff were paid voluntarily and without protest and therefore no relief could be given to the plaintiff. The learned counsel for the defendant cited the following decisions on this question: *Chairman, Municipal Council, Rajahmandry* v. *Subba Rao*[1], and *The Municipal Council, Tuticorin* v. *Ralli Brothers*[2]. In *Chairman, Municipal Council, Rajahmundry* v. *Subba Rao*[1], the assessee paid the tax in question for four years without any demur and thereafter filed a suit for recovery of money paid as profession-tax. On these facts it was held that there was no express protest. There is a fuller discussion on the point in the *Municipal Council, Tuticorin* v. *Ralli Bros.*[3] There also on the facts it was held that the payment made for the five half years was made without protest. But this decision lays down that the protest need not be in the form of a written protest against the levy of the tax. Conduct of the assessee would afford valuable guidance to find out if the payments were made voluntarily. It is true the mere threat in the demand notice that if the tax is not paid within fifteen days of service it will be recovered by distraint process would not amount to compulsory payment. But payment of taxes made before or at the time of filing appeals is not voluntary: *Samalkot Panchayat Board* v. *Ramaswami*[5]. The following observation of Krishnan Pandalai, J., is to the point: 'It is not necessary that the protest should be express; nor on the other hand does the fact of verbal protest always mean that the payment ceases to be voluntary. But the character of the payment is to be judged from the real nature of the circumstances in which it was made, which are not to be assumed by the extension of any theoretical assumption of what the man paying might have thought, the question always being what he did think'. Applying this test to the present case, it is clear that the father of the plaintiff never acquiesced in the increase of the property tax. Ever since it was first increased in February, 1948, he took all available steps by way of revision and appeal against the increase made in February, 1948. He also preferred a revision in 1949 when the tax was again increased to Rs. 6,660. The revision and appeal petitions are Exhibits B-7 dated 24th March, 1948, B-10 dated 3rd June, 1948, B-16 dated 6th April, 1949, B-27 dated 15th July, 1949, B-30 dated 31st August, 1949 and B-34 dated 17th November, 1949. The assessee was bound to pay the tax before he could avail himself of the procedure of filing a revision petition to the Commissioner and an appeal petition to the Municipal Council. Therefore, the mere fact of payment of the enhanced tax without distraint being levied is no indication that the payments were voluntary. The conduct of the father of the plaintiff, deducible from the revision and appeal petitions which he preferred, though unsuccessfully clearly establishes that he never acquiesced in the enhancement of the tax both in 1948 and in 1949. I therefore hold that the taxes were not paid voluntarily but were paid only under protest. See also *Maskell* v. *Horner*[4]; *Krishna Jute and Cotton Mills* v. *Municipal Council, Vijianagaram*[5]."

To this reasoning with which we entirely agree, we have to add the following. In regard to the refunds claimed in paragraph 9 of the plaint the plaintiff has categorically stated in paragraph 8 and in paragraph 12 that his father paid the excess amounts under protest. In paragraphs 15 and 16 of the plaint the significant phrase used is that the "amounts were collected" showing that the payments were not made voluntarily and which also in the context and circumstances of this case could not be deemed to have been made voluntarily.

Besides, as pointed by one of us in *Alli Ramanan*, In re[6], though a suit to recover any sum of money paid under a mistake of fact lies as provided in section 72 of the Indian Contract Act, and a payment made under a mistake of law cannot be recovered under section 72 of the Contract Act (*Adinarayana* v. *Mangapaka*[7]), it has to be borne in mind as mentioned in *Ramjee* v. *Masulipatam Municipality*[8], by Horwill, J.

1. (1937) 1 M.L.J. 496.
2. (1933) 67 M.L.J. 566.
3. (1937) M.W.N. 1075 : 46 L.W. 433 : A.I.R. 1938 M. 23.
4. (1888) 59 L.T. 636.
5. (1925) 49 M.L.J. 542 ; A.I.R. 1926 M. 152 : 22 L.W. 619.
6. (1957) 70 L.W. 19.
7. (1940) M.W.N. 423 : 51 L.W. 437 : (1940) 1 M.L.J. 582 : A.I.R. 1940 M. 660.
8. A.I.R. 1940 Mad. 956.

"As the law stands at present a person who pays tax under a misapprehension of law as to his liability to do so cannot recover it in a Court of law, although one would expect a corporate body to refund voluntarily any amount which had been paid to it in error",

following *Tuticorin Municipal Council* v. *Ralli Bros*[1], and *Rajahmundry Municipal Council* v. *Subba Rao*[2].

In practice when once a Court gives a declaratory relief that a levy made by a Municipality is illegal, it is proper to assume that the Municipality will act in conformity with that declaration. This is the principle of the following decisions: *Dyson* v. *Attorney General*[3]; *Rex* v. *Speyer*[4] and *Wigg* v. *Attorney General, Irish Free State*[5]. The principle was based by Lord Reading C.J., in *Rex* v. *Speyer*[4] as under:

"This is the King's Court; we sit here to administer justice and to interpret the laws of the realm in the King's name. It is respectful and proper to assume that once the law is declared by a competent judicial authority it will be followed by the Crown".

In fact even if the Municipality refuses to give effect to a declaration by a civil Court, the Government will exercise its overriding authority to enforce obedience on being moved in this behalf by the aggrieved party without *laches* on his part.

Therefore, the decree and judgment of the lower Court has got to be set aside and the memorandum of objections of the plaintiff will stand allowed to this extent.

Finally, coming to the refund claimed in paragraph 16 of the plaint, we have set out the reasons given by the Commissioner for imposing an assessment of Rs. 3,330. The Commissioner has taken into a account the general rise in rental of the theatres in Salem town, the increased income realised by the theatre owners consequent on the increased prosperity of the population during the years in question. The enhancement based upon these adequate reasons would take it out of the category of previous impeachable assessments as this would be a case of the provisions of the Act having been in effect complied with. On that conclusion it follows that under section 354 (2) of the Act no suit can be brought to recover any sum of money collected under the authority of the Act. The decree and judgment of the learned Subordinate Judge have got to be affirmed in respect of this claim and the memorandum of objections of the plaintiff has to be dismissed to this extent.

In the result, the appeal by the Municipality is dismissed and the memorandum of objections of the plaintiff is allowed to the extent of the amounts claimed in paragraphs 9 and 15 of the plaint and dismissed in regard to the amount claimed in paragraph 16 of the plaint. The plaintiff will get his costs on the allowed portion and give costs to the Municipality on the disallowed portion throughout.

The above appeal having been set down for being mentioned, the Court made the following order: "No justification. No further orders."

V.S. *Appeal dismissed: Memo. of Objections allowed in part.*

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1. 67 M.L.J. 566: A.I.R. 1934 Mad. 420.
2. (1937) 1 M.L.J. 496: A.I.R. 1937 Mad. 559.
3. L.R. (1911) 1 K.B. 410 at 421.
4. L.R. (1916) 1 K.B. 595 at 610.
5. L.R. 1927 A.C. 674.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. RAJAGOPALAN, *the Officiating Chief Justice* AND MR. JUSTICE RAJAGOPALA AYYANGAR.

Messrs. Haji Abdul Gaffoor Sahib & Co. .. *Petitioner**

v.

The State of Madras represented by the Secretary to Government, Revenue Department, Madras .. *Respondent.*

Madras General Sales Tax Act (IX of 1939) *and Article* 286 *of the Constitution of India* (1950)—*Sales of goods under a contract providing for the passing of goods at a later stage—Sale if exempt from tax.*

Sale of goods under a contract which provides expressly that the property in the goods sold shall pass to the buyers as soon as shipping documents came into their possession, notwithstanding the payment of the price in whole or in part earlier, or where payment is to be made on presentation of the shipping documents in order, are sales in the course of export and are as such exempt from tax liability under Article 286 of the Constitution.

Petition under section 12-B-1 of the Madras General Sales Tax Act praying the High Court to revise the Order of the Sales Tax Appellate Tribunal, dated 31st July, 1953 and made in T.A. No. 1036 of 1952.

T. S. Krishnamurthy Ayyar, M. R. M. Abdul Kareem and *Azeez Basha*, for Petitioner.

The Additional Government Pleader (*K. Veeraswami*) on behalf of the Respondent.

The Judgment of the Court was delivered by

Rajagopalan, O.C.J.—The petitioner was assessed to sales tax on his turnover in hides and skins for the assessment year 1950-51. The liability still in dispute before the Appellate Tribunal was with reference to the following items, which the Department claimed represented the sales of hides and skins within the State of Madras.

Sales under contracts entered into with

(1) Gordon Woodroffe & Co., (Madras, Ltd.	Rs.	1,80,925- 2-10
(2) Madras Hides and Skins Exporters, Ltd.	Rs.	1,19,846-10- 2
(3) Rallis (India), Ltd.	Rs.	2,05,101- 1- 0
(4) South Indian Export Co., Ltd.	Rs.	31,035- 6- 1
(5) Anwar & Co.	Rs.	12,231-13- 5
(6) Best & Co., Ltd.	Rs.	10,432- 7-11
(7) Haji Abdul Wahab & Sons	Rs.	6,68,500- 4- 8
(8) Srinivas & Co.	Rs.	24,582- 7- 4

The Tribunal took the view that all these items of turnover were liable to be taxed. The contentions of the learned counsel for the assessee were (1) that all these items represented sales outside India and that the companies listed above acted only as the agents of the petitioner assessee to effect these export sales; (2) even if the sales be viewed as sales to each of the companies mentioned above, the sales were in the course of export and were therefore covered by the exemption guaranteed by Article 286 of the Constitution and (3) the sales were completed only on the acceptance of the exported goods by the foreign buyers at the ports of destination and were therefore not liable to be taxed under the Madras General Sales Tax Act.

At the stage of the arguments before us the learned counsel for the petitioner did not press the claim under any of these heads with reference to the sales in favour of Srinivas Co., which were to the extent of Rs. 24, 582-7-4. The petitioner's liability to pay tax on that turnover is therefore no longer in dispute.

*T.R.C. No. 6 of 1954. 18th November, 1957.

With reference to items 1 and 2, sales to Gordon Woodroffe & Co., and to the Madras Hides and Skins Exporters, Ltd., the sales themselves were effected by the assessee at Madras. The contracts with the Madras Hides and Skins Exporters Ltd. provided that:

"the property in the goods shall pass to the vendees as soon as the shipping documents came into their possession and notwithstanding that payment has or has not been made in part or in full ;"

and the contracts with Gordon Woodroffe & Co., Ltd., provided "for payment on presentation of the shipping documents in order". These contracts also provided for the payment of the prices on C.I.F. terms.

In *Gandhi Sons, Ltd.* v. *State of Madras*[1], we held that where the property in the goods did not pass to the buyers until the relevant bills of lading were presented to the buyers, the sales were in the course of export which entitled the assessee to the Constitutional exemption under Article 286 (1) (*b*) of the Constitution. The learned Government Pleader could not refer us to anything in the contracts enterted into by the assessee with the Madras Hides and Skins Exporters, Ltd., and with Gordon Woodroffe & Co., Ltd., to take them outside the scope of the principle laid down by us in *Gandhi Sons, Ltd.* v. *State of Madras*[1]. At page 703 of our judgment in *Gandhi's case*[1], we pointed out that what had to be considered was

"whether the assessees had been able to establish that they remained owners of the goods until after the goods had crossed the customs barrier for if the agreement of sale entered into by them took effect and became a completed sale only thereafter, as the goods started on the course of export at that stage the sale by them would be one in the course of export to which Article 286 (1) (*b*) would apply."

At page 709 we stated :

"The bills of lading though taken in the name of the buyers were retained by the sellers and were deliverable only against payment. Two views are possible as to the inference to be drawn from the goods being consigned in the name of the buyers. One is that the seller reserves the *jus disponendi* in himself till the documents are presented to the buyer and the payment is made. That is the case which is provided by section 25 (3) of the Sale of Goods Act. The other is that the property passes immediately and the seller retains possession of the bills only for the purpose of claiming a lien on the goods to secure payment of the price, he having parted with the property in them. That the first of the above alternatives is the normal rule would appear to be favoured by the judgment of the Supreme Court in *Commissioner of Income-tax, Madras* v. *Mysore Cromats, Ltd.*[2]"

The contracts with the Madras Hides and Skins Exporters specifically provided that the property in the goods sold passed to the vendees only after the delivery of the shipping documents. The specific recital in the contracts with Gordon Woodroffe & Co., Ltd,. was that payment was to be on presentation of the shipping documents which clearly implied that the property in the goods passed to Gordon Woodroffe & Co., Ltd., as the buyers only after the presentation of the shipping documents. In both cases the property in the goods sold passed to the buyers only after the goods crossed the customs barrier and got into the stream of export. Thus they were sales in the course of export. The assessee's claim that these two items of turnover Rs. 1,80,925-2-10 and Rs. 1,19,846-10-2 were exempt from tax liability will have to be upheld. To that extent the order of the Tribunal will have to be modified. In the view we have taken of these sales and their liability to be assessed to sales tax, it may not be necessary to consider the first and the third of the contentions of the learned counsel for the assessee which we have mentioned above.

The next set of contracts we have to consider is what the petitioner-assessee entered into with Rallis (India), Ltd. The turnover of these sales was Rs. 2,05101-1-0. The contracts specifically recited :

"We, Rallis (India) Ltd., have confirmed having bought from you to-day the undermentioned goods."

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1. (1955) 2 M.L.J. 545; 6 S.T.C. 694.

2. (1955) 27 I.T.R. 128 ; 1955 S.C.J. 185 (S.C.).

Another of the relevant terms of the contracts was that the delivery of the goods sold should be at the godowns of the buyer, Rallis (India), at Madras. That should suffice to repeal the contention of the learned counsel for the petitioner, that the sales were by the assessee to buyers resident abroad and that Rallis (India), Ltd.; acted only as selling agents of the petitioner. The sales were completed at Madras by delivery of the goods sold at Madras. The petitioner was the seller and Rallis (India), Ltd., were the buyers. No doubt the hides and skins were sold by the petitioner to Rallis (India),Ltd. for export abroad, but then it was the buyers, Rallis (India), Ltd. that were the exporters. There was no privity of contract at any time between the petitioner and the persons abroad to whom the goods were ultimately sold by Rallis (India), Ltd. It is true the terms of the contract between the petitioner and Rallis (India) provided that the petitioner should bear the shipping charges, freight and insurance. These came out of the price payable by Rallis to the petitioner. The determination of the price payable for the goods sold did not by itself make it a C.I.F. contract in the sense in which the learned counsel for the assessee wanted us to construe the contract. It did not affect either the jural relationship of the petitioner and Rallis as seller and buyer of the goods in question. The learned counsel for the petitioner next referred to the terms of payment in the contracts. They provided :

"We Rallis (India), Ltd., will pay you an advance of 95 per cent of the value thereof, after deducting the Discount, Brokerage, Marine Insurance, Freight, Shipping Charges and Fire and R. & C. C. Risks Insurance. . . . . You also agree to pay us interest at the rate of 5 per cent. per annum from the date of payment to the date of the bill of lading. Any balance amount after allowing for all items as herein stated will be paid to you or collected from you after shipment is completed. We have a charge or lien on all goods covered by this contract for all moneys advanced by us including expenses incurred and interest thereon."

These again were terms for the payment of the price of the goods sold and did not, in our opinion, ,really affect the question for determination, when did the title to the goods sold pass from the petitioner as vendor to Rallis (India), Ltd., as vendees. We are unable to accept the plea of the learned counsel for the petitioner that on these terms we should hold that title to the goods passed to Rallis (India), Ltd., only after delivery to them of the shipping documents. We have pointed out earlier that the sales were completed by delivery of the goods sold to the buyer at his godown at Madras.

We are clearly of opinion that the sales to Rallis (India), Ltd., did not constitute either export sales or sales in the course of export. The sales were completed before export and it was the buyer that exported the goods. They were sales for export. Viewed from the point of view of the buyer, Rallis, they were purchased for export. Such sales are not within the scope of Article 286 of the Constitution. That was what we pointed out in *Gandhi Sons, Ltd.* v. *State of Madras*[1], in which we applied the principles laid down by the Supreme Court in the *State of Travancore-Cochin* v. *Bombay Co., Ltd.*[2], (*First Travancore case*); *State of Travancore Cochin* v. *S. V. C. Factory*,[3] (*Second Travancore case*). The Tribunal was right in holding that this item of the petitioner's turnover was liable to be taxed.

Items 4, 5 and 6, the sales to South Indian Export Co., Ltd., Anwar & Co., and Best & Co., Ltd., may be taken together. The contracts the petitioner entered into whith each of these firms were of the same pattern. The specimen contract entered into by the petitioner with the South Indian Export, Co.,Ltd., again opened with the words " we confirm having purchased from you the goods specified." That showed that the transaction of purchase was completed at Madras and title to the goods passed from the petitioner to the buyer before the goods were shipped by the buyer. No doubt the price quoted was the sum specified per lb. C.I.F.. London. As we have explained in the case of the contracts which the petitioner entered into with Rallis (India), Ltd., this was only a mode for computing

1. (1955) 2 M.L.J. 545: 6 S.T.C. 694.
2. (1953) 1 M.L.J. 1 (S.C.) ; (1952) S.C.J. 527 : (1952) 3 S.T.C. 434.
3. (1953) S.C.J. 473: (1953) 4 S.T.C. 205; (1953) 2 M.L.J. 123.

the price payable by the buyer to the petitioner, and that did not affect the question, when the title to the goods passed to the buyer. It is true the contract specified that shipment was to be within one month from the date of the contract. But that could only be construed to mean that the petitioner as seller was bound to deliver the goods sold to the buyer in time for the buyer as the exporter of the goods to complete the shipment within one month. That again did not affect the real position, the sales effected by the petitioner were not export sales—there was never any privity of contract between the petitioner and the buyer abroad—nor were they sales in the course of export delivery was completed long before the shipping documents came into existence. As in the case of Rallis (India), Ltd., they were sales for export and they were not covered by Article 286 of the Constitution.

Item 7 of the list we have furnished above represented the sales to the extent of Rs. 6,68,500-4-8 in favour of Haji Wahab & Sons. The Tribunal recorded that the petitioner was a partner of this firm, but that is not a relevant factor at all. Even at the stage of the arguments before us the petitioner could not produce any contract he had entered into with Haji Abdul Wahab & Sons. There was really no material on the basis of which we could accept any of the three contentions put forward by the learned counsel on behalf of the petitioner. The learned counsel invited our attention to some of the entries in the account books of Haji Abdul Wahab & Sons. But he admitted that those proceeded on the basis of purchases of the goods by Abdul Wahab from the petitioner, debiting him with their price. No doubt the price was computed, as in the case of Rallis after providing for the deduction of shipping charges, freight and insurance charges. We have again to point out that the mode of computation of the price payable is not enough to make it a C.I.F. contract, in the sense that the purchase was concluded only by delivery of the shipping documents. The amount may be large, but in the absence of material, which the petitioner alone could have furnished, to determine the true scope of the contracts between himself and Haji Abdul Wahab & Sons, we have to reject the claim of the petitioner, that the sales should be viewed either as export sales or at least as sales in the course of export. They were sales for export—by the buyer Haji Abdul Wahab & Sons—and they were therefore not within the scope of Article 286 of the Constitution.

Though what we have said earlier is enough to dispose of the third of the contentions of the learned counsel for the petitioner, that the sales in the case of each of the items 3 to 7 of the list we have furnished above were completed only on the acceptance of the exported goods by the foreign buyers at the ports of destination, we have to advert to that argument again to deal with the further arguments of the petitioner's learned counsel on this aspect. We have already pointed out that at no time was there any privity of contract between the petitioner and ultimate buyer of the goods abroad. *Vis a vis* that ultimate buyer, the firms to which the petitioner sold the goods at Madras were sellers. That the contracts between the petitioner and those firms provided that, if the buyer abroad ultimately rejected any of the goods as not up to the standard, the petitioner should reimburse the firms for the value of the rejected goods did not again affect the question at issue, when and where were the sales to the firms completed. They were completed by delivery of the goods to these firms at Madras when title to the goods sold passed to them, the appropriation of goods to the contract becoming completed by the assent of the buyer, notwithstanding the reservation of a right in the buyer to return such of the goods as were not accepted by those who had bought these goods from the buyer for the petitioner. The learned counsel relied on the observations at page 452 in *Hellbutt* v. *Hickson*[1]. It may not be necessary to deal at any length with the facts of that case, which were totally different from what we have had to consider in these cases.

In our opinion the Tribunal was right in holding that the turnover of the sales ncluded in items 3 to 8 of what we have listed above was liable to be taxed.

1. (1872) 7 Common Pleas 438.

The revision is allowed in part. As we have already directed, the turnover of the sales in favour of Gordon Woodroffe & Co. (Rs. 1,80,925-2-10) and the sales in favour of the Madras Hides and Skins Exporters, Ltd., (Rs. 1,19,846-10-2) will be deducted from the taxable turnover and the assessment will be accordingly. revised. The rest of the claim of the petitioner fails.

As neither side has wholly succeeded before us, there will be no order as to costs.

R.M. ——— *Revision allowed in part.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE RAMASWAMI.

K. R. Narayanaswami Chetty .. *Appellant.**

Civil Procedure Code (V of 1908), Order 20, rule 11 (2) (as amended in Madras) and section 47—Order on an application for payment of decree amount in instalments—If appealable under section 47 of the Code.

An order passed on an application under Order 20, rule 11 (2), Code of Civil Procedure (as amended in Madras) permitting a judgment-debtor to pay the decree amount in instalments, is one passed in exercise of the judicial discretion of the Court after hearing both sides and as such an appeal against such an order would lie under section 47 of the Code.

Saya Hattie v. *Ma Pwa Sa*, (1926) I.L.R. 4 Rang. 24 : 97 I.C. 1037, *Maung Po Maik* v. *P.R.M. K.M. Kasi Chettiar*, A.I.R. 1931 Rang. 152 and *Shree Jagruteshwar Deosthan* v. *Atmaram*, A.I.R. 1943 Nag. 437, followed.

Appeal sought to be preferred against the order of the Court of the Subordinate Judge, Vellore, dated 26th July, 1957, in E.A. No. 642 of 1957, in O.S. No. 82 of 1956.

The office submitted for orders the question of maintainability of a C.M.A. with the following Note :—

Office Note.

S.R. No. 26480 of 1957.

The above C.M.A. is sought to be filed against the order of the Subordinate Judge of Vellore, dated 26th July, 1957, in E.A. No. 642 of 1957 in O.S. No. 82 of 1956 on his file. The application in the lower Court was filed under Order 20, rule 11 (2), Civil Procedure Code, praying to permit the petitioner to pay the decree amount in instalments at Rs. 1,000 per quarter. The lower Court passed an order directing payments of Rs. 2,000 per quarter commencing from 26th October, 1957, in default of which the concession would stand as withdrawn. The question for consideration is whether a C.M.A. is maintainable as contended by the Advocate under section 47, Civil Procedure Code.

In support of the Advocate's contention he has cited the decisions of the Rangoon High Court reported in *V. Shwegone* v. *Ma Thal Ma* (1929) 119 I.C. 751 (1) and *Abdul Karim* v. *Maung San Kyaw*. (1931) 135 I.C. 858 relying on *Saya Hattie* v. *Mapwa Sa*, (1926) I.L.R. 4 Rang. 24 : 97 I.C. 1037. It was pointed out to the Advocate that in *Prem Nath* v. *Bana Mal*, A.I.R. 1928 Lah. 931 it has been held that an order passed under Order 20, rule 11, Civil Procedure Code, is to be regarded as a matter separate from the decree and is not appealable as the Code does not provide for an appeal against such an order. The above decision is based on the ruling of a Bench decision of the lower Burma Chief Court reported in *Mahamed Ibrahim* v. *Subbiah Pandaram*, (1913) 20 I.C. 673. There does not appear to be any Madras decision on the question raised herein. As the question of maintainability of a C.M.A. is not free from doubt the above S.R. is submitted for orders of Court.

N. K. Mohanarangam Pillai and *N. K. Pattabhiraman*, for Appellant.

The Government Pleader (*B. V. Viswanatha Ayyar*), on behalf of the State.

The Court made the following

ORDER.—The Office Note is coming up for orders in the following circumstances : This S.R. No. 26480 (the unnumbered C.M.A.) is sought to be filed against the order of the Subordinate Judge of Vellore, dated 26th July, 1957, in E.A.No. 642 of 1957 in O.S. No. 82 of 1956 on his file. The application in the Court below was filed under Order 20, rule 11 (2), Civil Procedure Code, praying to permit the petitioner to pay the decree amount in instalments at Rs. 1,000 per quarter. The lower Court passed on order directing payments of Rs. 2,000 per quarter commencing from 26th October, 1957, in default of which it was made clear that the concession extended would be withdrawn. The present appeal is sought to be preferred against that order of the Subordinate Judge.

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*S.R. No. 26480 of 1957. 25th November, 1957.

The question for consideration posed by the office is whether a Civil Miscellaneous Appeal is maintainable as contended for by the advocate for the appellant under section 47, Civil Procedure Code.

In regard to the request made by the judgment-debtor for payment of the sum by instalments there are two stages: one is before the decree is passed in which case any order passed regarding payment by instalments is appealable as it forms part of the decree.

The other stage is after the passing of the decree and Order 20, rule 11(2), as unamended runs as follows:

"After the passing of any such decree the Court may, on the application of the judgment-debtor and with the consent of the decree-holder, order that payment of the amount decreed shall be postponed or shall be made by instalments on such terms".

In such a case the order passed is a consent order and the consequence is that there could be no appeal from such consent orders. But so far as this High Court is concerned this rule has been amended and the amended rule 11(2) of Order 20, Civil Procedure Code, runs thus:—

" After the passing of any such decree the court may on the application of the judgment-debtor and after notice to the decree-holder order that payment of the amount decreed shall be postponed or shall be made by instalments on such terms, etc."

In other words notice is given to the decree-holder and after hearing both sides judicial discretion is exercised and an order regarding payments by instalments, etc., is passed. Therefore this cannot be said to be a consent order from which no appeal could be filed.

In other words on principle under the Madras amendment the passing of an order exercising judicial discretion under Order 20, rule 11 (2), Civil Procedure Code, is subject to appeal. The point is concluded by authority. Vide *Saya Hattie* v. *Ma Pwa Sa*[1], and *Maung Po Maik* v. *P. R. M. K. M. Kasi Chettiar*[2], in which it has been held that such orders are appealable. The Nagpur High Court holds a similar view in *Shree Jagruteswar Deostham* v. *Atmaram*[3], where it has been held that orders passed under Order 20, rule 11 (2), Civil Procedure Code, as amended on the Madras lines are appealable under section 47, Civil Procedure Code.

The Office Note is answered accordingly, namely, that a Civil Miscellaneous Appeal lies against the order of the Subordinate Judge in the present case under section 47, Civil Procedure Code.

I thank the learned Government Pleader for placing all the relevant authorities before me to give a considered decision on the subject.

R.M. ——— *Office Note answered.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE RAMASWAMI.

Pappa Bai .. *Petitioner**

v.

The State of Madras represented by the Assistant Collector, Nagapattinam and another .. *Respondents.*

Hindu Law—Religious Endowment—Mutt—Matathipathi—Powers and functions of—Death of Matathipathi pending litigation—Will making daughter successor Matathipathi—Competency of daughter to come on record as "legal representative"—Civil Procedure Code (V of 1908), section 2 (11).

A Matathipathi has always two characters, spiritual and temporal; and it is competent for him by his last will and testament to make any arrangement for safeguarding the properties of the Mutt as distinguished from the appointment of a successor. Till the successor is chosen who will combine

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1. (1926) I.L.R. 4 Rang. 24 : 97 I.C. 1037.
2. A.I.R. 1931 Rang. 152.
3. A.I.R. 1943 Nag. 437.

*C.M.P. No. 5714 of 1957 in Appeal No. 129 of 1957. 26th November, 1957.

in himself the spiritual and temporal functions, arrangement can be made for an interim trustee in regard to the temporal functions of the Matathipathi.

Where in his will a Matathipathi makes his daughter the next Matathipathi, and dies pending legal proceedings, there is no objection to bring her on record as the legal representative of the deceased for prosecuting the pending proceedings, though she may not be qualifid to be a Matathipathi, as it is not necessary for her to be the Matathipathi in order to come on record as a legal representative as defined by section 2 (11), Civil Procedure Code.

Petition praying that in the circumstances stated in the affidavit filed therewith the High Court will be pleased to bring on record the petitioner herein as the legal representative of the deceased appellant in Appeal No. 129 preferred to the High Court against the order of the Court of the Subordinate Judge of Mayuram dated 11th December, 1956 and made in O.P. No. 10 of 1955.

V. Srinivasan, for Petitioner.

P. G. Rajan for The Government Pleader (*B. V. Viswanatha Ayyar*) and *S. Tygaraja Ayyar* for Respondents.

The Court made the following

ORDER.—The dispute in this case is as regards the land acquisition compensation amount relating to a parcel of land in Tiruvarur. It is claimed by two rival people. One is by the Ramadoss Mutt represented by Trustee Govinda Dass Bava. The other claimant is one Dhanammal, a private party. Govinda Dass Bava has died during the pendency of the appeal. He has left a will dated 7th February, 1957, by which he has purported to make his daughter Pappa Bai the Matathipathi. The other side points out that Pappa Bai cannot come in as successor Matathipathi. The learned Advocate for the respondent relies for this position on my judgment in A.S. No. 57 of 1954, paragraph 796 (page 928) of Mayne's Hindu Law (eleventh edition), B. K. Mukerjee's "Hindu Law of Religious and Charitable Trust" (Tagore Law Lectures, page 354, and Ganapathi Iyer's "The Law Relating to Hindu and Mohamedan Endowments, second edition, page 480 and following. It is not however necessary for Pappa Bai to be the Matathipathi in order to come on record in this appeal. The term "legal representative" in section 2(11) of the Code of Civil Procedure as meaning a person who in law represents the estate of a deceased person and including any person who intermeddles with the estate of the deceased and where a party sues or is sued in a representative character the person on whom the estate devolves on the death of the party so suing or sued. Under his last will and testament Govinda Doss Bava was competent to make an arrangement for safeguarding the properties of the Mutt as distinguished from the appointment of a successor. The Matathipathi has always two characters, spiritual and temporal. Till the successor is chosen who will combine in himself the spiritual and temporal functions, arrangements can be made for an interim trustee in regard to the temporal functions of the Mathathipathi. In this case Pappa Bai also does not say that she is claiming the money as her money. On the other hand she says that she is fighting only on behalf of the Mutt and that in the event of her succeeding it might be made clear that the money would not be drawn by her but would only be earmarked for the Mutt. Therefore, I see no objection to bring Pappa Bai on record as the legal representative of the deceased Govinda Dass Bava for prosecuting the appeal.

The petition is allowed.

P.R.N. *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE, AT MADRAS.

PRESENT :—MR. JUSTICE PANCHAPAKESA AYYAR.

Syed Sahib .. *Petitioner**

v.

Angamuthu Mooppan .. *Respondent.*

Madras Cultivating Tenants Protection Act (XXV of 1955 and XIV of 1956), section 6-A—Transfer of pending proceedings before Civil Courts—Nature of finding of Civil Courts—Procedure.

It is no doubt true that under section 6-A of the Madras Cultivating Tenants Protection Act certain proceedings between landlords and tenants of agricultural land pending before a Civil Court has to be transferred to the Revenue Court after the coming into force of the said Act, if the Civil Court find that the defendant against whom the proceedings are taken is a cultivating tenant entitled to the benefits of the Act. But this finding by a Civil Court is only a *prima facie* finding and is not final and binding on the Revenue Court.

A suit for an injunction by a landlord against another who claims to be entitled to possession of certain lands in dispute as lessee, when transferred to the Revenue Court under section 6-A of the Act will automatically become a petition by the tenant for restoration of possession of the land and there is no need to file a separate petition for the purpose before the Revenue Court. The legal fiction enacted in section 6-A provides that the Revenue Court shall dispose of the transferred proceedings as though it were an application under Act XIV of 1956. The period of limitation of two months from the coming into force of the Act for filing applications cannot operate in such cases as the date of the filing of the suit will be the date for purposes of the claim before the Revenue Court on transfer.

Petition under section 6 (*b*) of the Madras Act XXV of 1955, as amended by Madras Act XIV of 1956, praying the High Court to revise the Order of the Revenue Court of Trichinopoly dated 5th September, 1957 and made in E.A. No. 104 of 1957.

S. Ramachandra Ayyar and *P. S. Srisailam*, for Petitioner.

A. V. Narayanaswami Ayyar, for Respondent.

The Court delivered the following

JUDGMENT.—This is a petition filed by one Syed Sahib, the owner of the holding, for revising and setting aside the order of the Revenue Court, Tiruchirapalli, in E.A. No. 104 of 1957, holding that the respondent, Angamuthu Mooppan, was the cultivating tenant in respect of the suit land and should not be evicted therefrom under Act XIV of 1956, and that he was not also barred by limitation regarding his "assumed" petition for restoration of possession. The petitioner had contended that the respondent was at no time the cultivating tenant of the suit land, and that one Sevanthalingam and his wife were the cultivating tenants, and that the respondent was simply an interloper trespasser and impostor, against whom the petitioner had filed O.S. No. 422 of 1956 on the file of the District Munsif, Tiruchirapalli, for an injunction, restraining him from interfering with possession of the land. When that suit was pending, the Act was passed, and, under section 6 (A), the learned District Munsif gave a finding that the respondent was *prima facie* a cultivating tenant entitled to the benefits of the Act, and so, did not proceed with the trial of the suit, but transferred it to the Revenue Court. The Revenue Court (the Revenue Divisional Officer, Tiruchirapalli) held that the respondent was the cultivating tenant and that his "assumed" petition for restoration of possession was not barred by limitation, and allowed it, and refused eviction. Hence this petition.

I have perused the records and heard the learned counsel on both sides. Mr. S. Ramachandra Ayyar, the learned counsel for the petitioner, raised three main contentions, the first was that the finding of fact, namely, that the respondent was the cultivating tenant in respect of the suit land, was not only erroneous, but was also not given by the Revenue Court, which had to give it on its own responsibility, and not merely adopt the finding of the District Munsif, which could, in the circumstances, be only provisional. I have no hesitation in agreeing with Mr. Ramachandra Ayyar that the finding of the civil Court under section 6 (A) that

*C.R.P. No. 1273 of 1957. 20th December, 1957.

the defendant is a cultivating tenant entitled to the benefit of the Act, is only a *prima facie* finding and can never be a final finding, binding on the Revenue Court. Mr. A.V. Narayanaswami Ayyar did not contest this position, but his argument was that the Revenue Court went into the question and arrived at its own conclusion that the respondent was the cultivating tenant in respect of the suit land and did not merely adopt the District Munsif's *prima facie* conclusion in that respect. I agree with Mr. Narayanaswami Ayyar that the Revenue Divisional Officer arrived at his own conclusion that the defendant was the cultivating tenant in respect of the suit land, and merely added that he agreed with the *prima facie* conclusion of the learned District Munsif. Agreeing with the conclusion of the District Munsif is quite different from adopting the *prima facie* conclusion of the District Munsif. Mr. Ramachandra Ayyar, on this being pointed out, dropped this contention; nor have I the least doubt that, on the facts the Revenue Court's finding that the defendant was the cultivating tenant on the relevant date is the correct one.

The next contention of Mr. Ramachandra Ayyar was that there was no petition by the respondent for restoration of possession of the holding to him, and that, actually, a temporary injunction had issued and the petitioner had been thereafter in peaceful occupation and possession of the holding. The argument is unsustainable. Section 6-A says that on the transfer of the suit by the Civil Court to the Revenue Court, the Revenue Divisional Officer shall deal with the matter and dispose of it, as though it were an application under Act XIV of 1956. No doubt, as Mr. Ramachandra Ayyar pointed out, this is a legal fiction; but legal fictions are well known to law, and are, in fact, a kind of hidden soul in the law, making for progress. Many Acts contain such legal fictions. There is no question of their validity, as the sovereign legislature, or any other legislature to the extent of its competence, can legislate with such fictions added on, provided there is no discrimination under Article 14 of the Constitution or any other invalidating factor none of which exist here. So, the moment the District Munsif, Tiruchirappalli, transferred the suit for injunction, under section 6-A to the Revenue Divisional Officer, that suit automatically became a petition for restoration of possession by the tenant, though in fact the tenant had not filed any such petition. The fact that a temporary injunction was issued against the respondent, and that the petitioner continued in peaceful occupation and enjoyment of the holding thereafter, is utterly irrelevant. Both the landlord and tenant had to obey the orders of Courts on pain of punishment. So, the fact that the tenant obeyed the orders of Court, and kept away from this land till the Court restored it to him, will not at all help the landlord petitioner in this case.

The last contention of Mr. Ramachandra Ayar was that the petition was barred by limitation. He had to agree that the period of limitation allowed under the Act for a petition for restoration, real or "assumed", would be 1st December, 1956, that is, two months after the Act came into force on 1st October, 1956. This "assumed" petition for restoration took its beginning with the filing of the suit on 27th July, 1956, and would, therefore, not be barred by limitation.

All the contentions of Mr. Ramachandra Ayyar fail, and this petition deserves to be, and is hereby, dismissed; but, as I am deciding the points of law raised herein for the first time now, I direct all the parties to this Civil Revision Petition to bear their own costs.

R.M. *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—P. V. RAJAMANNAR, *Chief Justice* AND MR. JUSTICE PANCHAPAKESA AYYAR.

R. Venkatapathy .. *Appellant**.

v.

The Dy. Inspector-General of Police, Western Range, Coimbatore and others .. *Respondents.*

Government servant on probation—When becomes full member of service—Mere expiry of a period of probation—If makes him full member of the service—Matters that can be considered by superior officer while deciding about suitability to become full member of the service.

In cases of Government servant on probation, on the expiry of the period of probation, if the concerned superior officer finds that his probation has been found satisfactory he may be confirmed in service. The question of confirmation can be taken up only after the period of probation has come to an end. It cannot be said that on the expiry of the period of probation there is no jurisdiction in the superior officer even to consider the qustion of confirmation. It is open to the officer concerned to take into consideration facts that have happened even after the period of probation is over in deciding about the suitability of the candidate to become a full member of the service.

Appeal under clause 15 of the Letters Patent against the order of the Honourable Mr. Justice Rajagopalan dated 18th December, 1956 and made in the exercise of the Special Original Jurisdiction of the High Court in W.P. No. 250 of 1956, presented under Article 226 of the Constitution of India to issue a writ of *certiorari* calling for the records connected with the orders of the Deputy Inspector-General of Police, Western Range, Coimbatore, in R.C. No. 790, G.L./'54 dated 8th October, 1954, the orders of the Inspector-General of Police, Madras in R.C. No. 557/AP./'54 dated 13th and 18th January, 1955 and the order of the Government of Madras in G.O. R. No. 3187, Home, dated 26h September, 1955 and to quash the orders made therein.

S. Mohan Kumaramangalam and *K. V Sankaran*, for Appellant.

The Judgment of the Court was delivered by

Rajamannar, C.J.—Two points were pressed on us by Mr. Kumaramangalam in the appeal against the judgment of Rajagopalan, J., dismissing a writ petition filed by the appellant against the order of the Deputy Inspector-General of Police, Western Range, Coimbatore, and the subsequent orders of the Inspector-General of Police and the Government of Madras confirming the order of the Deputy Inspector-General, terminating his probation. The first point was that as the extended period of probation of the appellant terminated on 2nd July, 1951, he should be automatically deemed to have become a full member of that service on and from that day and subsequently if action was proposed to be taken against him, the procedure should be that pertaining to a full member of the service, and the procedure of terminating the probation cannot be availed of. Actually it appears on 11th July, 1951, a few days after the period of probation expired, notice had been issued to show cause why his probation should not be terminated. Before, however, these proceedings could be continued and disposed of, there was a criminal trial in which the appellant was involved which ended in his conviction and consequent dismissal from service. The appellant, however, was acquitted on appeal by this Court on 7th May, 1954 and as a result of that he was reinstated in service in June, 1954. On the 19th July, 1954, proceedings were again started when notice was served on him to show cause why the probation should not be terminated. The appellant submitted his explanation. But the Deputy Inspector-General of Police, Coimbatore, held that the charges were proved and on 8th October, 1954, he ordered termination of the probation. His appeals to the Inspector-General of Police and the Government were fruitless. Thereafter he filed the writ petition from which this appeal arises.

The contention of Mr. Kumaramangalam was really twofold: firstly, that once the extended period of probation came to an end, the appellant automatically

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* W.A. No. 82 of 1957. 2nd August, 1957.

became a full member of the service. We are unable to find anything in the rules to support this contention. It is one thing to say that the period of probation had come to an end on 2nd July, 1951; it is quite another thing to say his probation was found satisfactory, and he was admitted as a full member of the service. Before the latter could be done, there should be a finding by the concerned superior officer that his probation has been found to be satisfactory. Necessarily the determination of this question can only be taken up after the period of probation has come to an end. It is idle to contend that the superior officer has no right even to come to a conclusion whether the probation has been satisfactory and whether he is entitled to be admitted a full member of the service. The second part of learned counsel's contention was that even assuming that the Deputy Inspector-General of Police could, after the expiry of the period of probation, go into the question whether the appellant should or should not be admitted as a full member of the service, nothing which happened subsequent to the expiry of that period could be taken into account in deciding the matter. We do not agree. Here again the fallacy is that the superior officer is not concerned only with the question whether during the particular period of probation the conduct of the appellant was or was not satisfactory. There is a further obligation on his part to come to a conclusion that the appellant can be admitted as a full member of the service. In arriving at this conclusion anything which has happened subsequently to the expiry of the period of probation will also be relevant. Take for instance a case when after the expiry of the period of probation the appellant had been guilty of any conduct which would not entitle him to become a full member of the service. We think such conduct can be taken into consideration.

The next contention of Mr. Kumaramangalam was based upon a memorandum issued by the Inspector-General of Police adverting to the provisions of G.O. No. 384, Public (Services) dated 10th April, 1954. The question dealt with in that G.O. was whether it is permissible to take an officer's past record into account in disposing of a disciplinary case against him. It was laid down that such record or any part of it could not be taken into account in arriving at a finding on the primary charge but it may be taken into account in the punishment to be awarded in case the primary charge or charges are proved. Of course if there had been anything in the appellant's past record which had been already disposed of but which was taken into account in the proceedings which culminated in the order of termination of his service in 1954, then the appellant might have a legitimate grievance, though we doubt whether that would have affected the jurisdiction of the officer to pass the order in question. Actually, however, in this case there was no such thing. At no time were the charges which were framed in July, 1951, ever gone into, and it is only in October, 1954, for the first and only time that charges were not only framed but were also found to have been established and action taken on that. There are no merits in this appeal.

R.M. ——— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. P. RAJAGOPALAN, *Officiating Chief Justice* AND MR. JUSTICE RAJAGOPALA AYYANGAR.

M. P. K B. Karuppan Chettiar .. *Appellant**

v.

PL. M. C T. K. Krishnappa Chettiar .. *Respondent.*

Madras Agriculturists' Relief Act (IV of 1938), section 3 (ii), proviso (c)—Applicability to cases of house-tax levied under Pudukottai Regulation (III of 1925.)

The Merged States (Laws) Act (XXXV of 1949), sections 4, 5, 6 and 7—Effect of—Merger of former State of Pudukottai in Madras—Applicability of Madras enactments—Principle of construction—Effect of prior corresponding law.

A house-tax levied under the former Pudukottai Village Panchayat Regulation (III of 1925) during the relevant period of four half years prior to 1st October, 1937, will be an assessment to property tax within the meaning of proviso (C) to section 3 (ii) of the Madras Agriculturists' Relief Act (IV of 1938) so as tho disentitle such assessee to the benefits of the said Act.

* A.A.O. No. 119 of 1957. 13th December, 1957.

(The scope of the former laws in force relating to levy of house-tax in Pudukottai State explained—Effect of the provisions of the Merged States (Laws) Act discussed—Scheme of repeal of the previous regulation and applicability of the Madras Local Boards Act (XIV of 1920), explained).

Appeal against the order of the Court of the Subordinate Judge of Pudukottai, dated the 5th March, 1957 in O.P. No. 4 of 1953.

K. Bashyam Ayyangar, T. R. Srinivasan and *T. Ramalingam* for Appellant.

K. S. Ramamurthi and *K. Sarvabhauman*, for Respondent.

The Judgment of the Court was delivered by

Rajagopala Ayyangar, J.—The Chief Court of Pudukottai passed a decree against the appellant in O.S. No. 390 of 1944 on its file. This was a compromise decree on a claim under a settlement dated 31st July, 1946. The appellant claiming himself to be an agriculturist entitled to relief under Madras Act IV of 1938 applied to the Subordinate Judge, Pudukottai, which was the successor of "the Court which passed the decree" for its scaling down under section 19 of the Act. This was O.P. No. 4 of 1953, and it is the correctness of the order of the Subordinate Judge dismissing the petition that forms the subject-matter of this appeal.

There was no dispute regarding the appellant having a "saleable interest in agricultural land". But this claim to the relief was disputed on the ground that he fell within proviso (C) to section 3(ii) by having been assessed to house tax under municipal enactments the aggregate of which exceeded Rs. 600. It may be stated that the appellant admittedly owned three houses in the Panchayat of Alagapuri in the erstwhile Pudukottai State where he was assessed to property tax under the relevant enactment and that the annual rental value of those houses was Rs. 1025. The question which we have to consider is whether the decision of the Court below, that the ownership of these houses with this annual rental value and their assessment to tax by the local authorities of Alagapuri brought the appellant within the exception enacted by the proviso, is correct.

The provision to be construed runs:

"Provided that a person shall not be deemed to be an agriculturist if he

(C) has in all the four half years immediately preceding the 1st October, 1937, been assessed to property or house tax in respect of buildings or lands other than agricultural lands, under the Madras District Municipalities Act, 1920, the Madras City Municipal Act, 1919, the Cantonments Act, 1924 or any law governing Municipal or Local bodies in *any other State in India* or under the Madras Local Boards Act, 1920, in a Panchayat which was a Union before the 26th August, 1950, provided that the aggregate annual rental value of such buildings and lands, whether let out or in the occupation of the owner, is not less than Rs. 600;"

Before dealing with the arguments of the learned counsel for the appellant, it might be convenient to set out the laws on the basis of which the appellant's houses in Alagapuri were subject to assessment. The laws governing the local bodies in the Pudukottai State recognised three types of such bodies. The first namely the municipalities we are not now concerned with. There was a regulation entitled "the Pudukottai Village Conservancy Regulation" (No. IV of 1909) which created unions or panchayats for villages. Under this enactment unions were constituted which were vested with the power to levy house tax (*vide* section 5 (1) of the Regulation). The corporations which were established were called unions, the governing bodies of such unions being called panchayats. Alagapuri did not fall within the scope of this Regulation. There was another statute, Regulation III of 1955 entitled "The Pudukottai Village Panchayat Regulation". By its section 2 (*a*) its territorial operation extended

"to the whole of the Pudukottai State except the Municiplaity of Pudukottai and the unions to which the Pudukottai Village Conservancy Regulation No. IV of 1909, applies."

Under this enactment panchayats were constituted for carrying on the affairs of the village in areas to which Regulation III of 1925 extended. Section 25 of this enactment enabled the panchayats to levy an yearly tax on the capital value of buildings. By notification dated 16th June, 1927, the village of Alagapuri was brought within the operation of Regulation III of 1925, and the property tax which we referred to earlier was levied under this Regulation.

The argument of learned counsel for the appellant was briefly this. There was a decree against the appellant which was sought to be executed against him. If the appellant were an agriculturist within Act IV of 1938, he was entitled to have it scaled down under section 19 of the Act. That he possessed agricultural lands in the State is not in dispute. He was therefore an agriculturist and he would be entitled to the benefits of the scaling down provision, unless the decree-holder were able to establish that the appellant was statutorily to be " deemed not to be an agriculturist " as falling within the several provisos to section 3. The provision that was invoked against him was Proviso (C). The appellant did own houses in Alagapuri in the erstwhile Pudukottai State whose assessable value exceeded Rs. 600 but this did not bring him within the disqualification because the property or house tax was not assessed or levied under the enactments specified in the section. By reason of the merger Pudukottah became part and parcel of the Madras State and hence the portion of the proviso which referred to assessment under " any law governing municipal or local bodies in any other State in India " became inapplicable to Pudukottah territory. The assessment had therefore to be under one or other of the following enactments to effect the disqualification, the District Municipalities Act, 1920, the City Municipal Act, 1919 or the Cantonments Act, 1924 or under the Local Boards Act, 1920 in a panchayat which was a union before 26th August, 1930. The assessment was not under these or even any parallel provisions and hence the appellant was not within the proviso or the disqualification thereby created.

Before proceeding to discuss the point in the light of the several enactments which effected the integration of the Pudukottai State with the State of Madras and the provisions contained in them relevant to the present subject-matter, it may be mentioned that if the question had arisen before the integration, it could have been capable of only one answer, *i.e.*, against the appellant. Before that date the relevant words in the Proviso (C) ran :

> "or any law governing municipal or local bodies in any other province in British India or in any Indian State."

Pudukottai Regulation III of 1925 would have been such a law and if a judgment-debtor under any decree passed in this State possessed properties in Alagapuri, the annual rental value of which exceeded Rs. 600 he would not be deemed to be an agriculturist within Act IV of 1938. The question for our consideration is whether the integration of Pudukottah with this State has made any difference to this result.

The Ruler of Pudukottai State acceded to the Indian Union in March, 1948. This brought Pudukottai within the ambit of the Extra Provincial Jurisdiction Act, 1947 (Central Act XLVII of 1947). The preamble to this Act enacted :

> "Whereas by treaty, agreement, grant, usage, sufferance and other lawful means, the Central Government has, and may hereafter acquire jurisdiction in and in relation to areas outside [India]".

By the operative provisions of this enactment (sections 3 and 4) the Central Government was enabled to exercise extra provincial jurisdiction in such manner as it thought fit and to determine the law and the procedure to be observed in such areas. In exercise of the powers conferred by this enactment, the Central Government passed the Pudukottai and Banganapalli (Application of Laws) Order, 1949, on 9th April, 1949. As the only enactments extended to the area by this order were certain Central Acts which are not relevant to the present context, we are omitting further reference to this. This was followed up by the State Merger (Governor's Province) Order, 1949, dated 27th July, 1949. By inclusion in Schedule I to the order the States of Pudukottai, Banganapalli and Sandur were merged in the Province of Madras ; and under its section 3 as from the appointed day " (1st June, 1949) Pudukottai was to be administered in all respects as if it formed part of the province of Madras". This Order contained other consequential provisions which are not material for the present purpose. But what is to the point is that this order operated to effect the integration of Pudukottai with the State of Madras.

The Madras Legislature thereafter enacted Act XXXV of 1949—The Merged States (Laws) Act—to extend certain laws to the State of Pudukottai etc., which are administered as parts of the province of Madras. Section 3 of the Act extended the laws set out in the First Schedule to the Act to " the merged states " including Pudukottai. Among the enactments so extended were the Madras District Municipalities Act (V of 1920) the Local Boards Act (XIV of 1920), the Agriculturists Relief Act (IV of 1938) to mention only those which are relevant for our present purpose. Sections 4 to 7 of this enactment contained provisions which have a material bearing on the point to be decided in this appeal and it is really their interpretation that the appeal involved. Section 4 enacted :

" 4. In any enactment specified in the First Schedule......(which as stated before included Madras Act V of 1920, XIV of 1920 and IV of 1938).

(*d*) any reference, by whatever form of words, to the State of Madras shall be construed as including a reference to the merged State or States concerned.

5. If, immediately before the commencement of this Act, there is in force in any merged State, an Act, Ordinance, Regulation or other law corresponding to an enactment specified in the First Schedule............such corresponding law shall, upon the commencement of this Act, stand repealed to the extent to which the law relates to matters with respect to which the State Legislature had power to make laws for the state.

6. (1) The repeal by section 5 of this Act of any corresponding law in force in any merged State immediately before the commencement of this Act shall not affect.

(*a*) the previous operation of any such law, or any penalty, forfeiture or punishment incurred in respect of any offence committed against any such law, or

(*c*) any investigation, legal proceedings or remedy in respect of any such penalty, forfeiture or punishment, and any such investigation, legal proceeding or remedy may be instituted, continued or enforced and any such penalty, forefeiture or punishment may be imposed as if this Act had not been passed.

(2) Subject to the provisions of sub-section (1) anything done or any action taken, including any appointment or delegation made under such corresponding law shall be deemed to have been done or taken under the corresponding provision of the enactment as now extended to, and in force in the merged state and shall continue in force accordingly unless and until superseded by anything done or any action taken under the said enactment.

7. For the purpose of facilitating the application in any merged state of any enactment specified in the First Schedule, any Court or other authority may construe such enactment with such alterations not affecting the substance as may be necessry or proper to adapt it to the mater before the Court or other authority".

We are clearly of the opinion that the house tax levied on the appellant under Regulation III of 1925 of Pudukottai during four half years preceding 1st October, 1937 has the same legal effect as an assessment to property tax under the provisions of the enactments mentioned in Proviso (C) to section 3(ii) of Act IV of 1938. By virtue of section 5, the Pudukottai Regulation III of 1925 stood repealed, because there was an enactment corresponding to it specified in the First Schedule, namely Act XIV of 1920, and Act XIV of 1920 stood extended to the merged state under section 3 of the Act. The rule of interpretation laid down by section 4(*d*) as that to be adopted in regard to the construction of the Local Boards Act was that the reference to the territory forming the " State of Madras " in Act XIV of 1920 had to be understood as including a reference to the area of Pudukottai. In passing, we might mention that the learned Suboridnate Judge thought that there was some defect in the drafting of section 4 (*d*) but we are unable to share this opinion.

What then was the effect of this repeal of the Pudukottai Regulation and the extension of the Loacal Boards Act to that area ? It is common ground that before the merger of Pudukottah and the repeal of the Pudukottai Regulations, the house tax paid by the appellant to the Panchayat of Alagapuri brought him within Proviso (C) as being a tax levied under " a law governing local bodies " in a native State in India. The contention however is that the merger has effected a change in the law. Section 6(2) enacts ;

"(2) Subject to the provisions of sub-section (1) anything done or any action taken......under such corresponding law shall be deemed to have been done or taken under the corresponding provision of the enactment as now extended......."

In the present context the corresponding provision is Act XIV of 1920. The contention urged by Mr. Bashyam Ayyangar was that "the corresponding provision of the enactment and now extended" would in regard to the matter now under debate be the Local Boards Act (XIV of 1920) and "the corresponding law" "the action taken" under which is the subject of the deeming provision would be the Village Conservancy Regulation IV of 1909 and not the Panchayat Regulation III of 1925 by which the local administration of Alagapuri was governed. The basis for this argument is to be found in the terms used in Proviso (C) in relation to the taxes levied under the Local Boards Act "a Panchayat which was a Union before 26th August, 1930". Learned counsel urged that Panchayats which were Unions before 26th August, 1930, were constituted for areas with a minimum population of 5,000 and that Alagapuri which had a population of about 500 inhabitants could therefore not be deemed to be such a Panchayat.

We do not find it possible to accept this argument. The date 26th August, 1930 in the Proviso in Act IV of 1938 is a reference to the date when the Madras Act XI of 1930, which amended the Madras Local Boards Act, 1920, came into force. Under the original enactment of 1920 there were three grades of local bodies the District Boards, Taluk Boards and Unions. Unions were constituted under section 4(2) of the Act which ran:

> "With the approval of the Local Government, the District Board may for the purpose of this Act delcare by notification any revenue village or villages or any portion or portions thereof to be a union provided that no area shall be declared to be a union unless it has a population of not less than 5,000".

Independently of this there were village panchayats under Act XIV of 1920 which provided for local government in villages which were not unions under Act XIV of 1920.

The Local Boards Act XIV of 1920 was amended by Act XI of 1930 and the change it effected in regard to unions was this. By the new section 4 (5) the Local Government were enabled by notification to declare any part of a revenue taluk to be a village for the purpose of the Act and specify the names of the villages and the local areas which before that date was named "a union" came to be designated under the amending Act as "a village." The governing body of this area which was originally called a "Union Board" was altered by the amending Act to "panchayat." Villages with a population of 5,000 and upwards and contiguous villages whose total population reached that figure were all brought within the scope of "Unions" governed by the unamended Madras Act XIV of 1920 and they continued to be villages under the amended Act. By virtue of Act XI of 1930 a re-organisation of the areas of the villages took place and there was a splitting up of areas for the constitution of village panchayats. It was in view of these circumstances that reference was made in Act IV of 1938 to "panchayats" which were unions before 26th August, 1930 to exclude villages which were governed by the Village Panchayat Act XV of 1920. This however does not bear upon the question of the corresponding law of the Pudukottai State. The unions and the panchayats governed by the Regulations of 1909 and 1925 would both fall within the category of union within the Local Boards Act, 1920, without any reference to the point of distinction denoted by the date 26th August, 1930 based on historical, and in the present context, accidental reasons.

To start with we have the admitted fact that until accession of Pudukottai and its merger the payment of the tax to the Alagapuri local authority being under a "law governing municipal local bodies in a Native State" would have brought the appellant within the scope of the proviso, notwithstanding that Alagapuri was governed by Regulation III of 1925 and not Regulation IV of 1909. The Regulations were repealed by section 5 of the Merged States (Laws) Act of 1949 with "the previous operation of the law unaffected."

It is in the context of this situation that the corresponding law of the Pudukottai State has to be ascertained. Let us assume that Regulation III of 1925 were the only law governing local authorities in the Pudukottai State. It would not be possible

to argue that the levy of property tax in Alagapuri did not bring the appellant within the proviso merely because Alagapuri had a population less than 5,000. The question that next arises is as to whether the existence of another law governing local bodies and to which Alagapuri was not subject makes any difference to this result. In our judgment this can be answered only in the negative. Supposing that the basis of division between major and minor unions in the Pudukottai State was based not on population but on other factors or if population be the test but instead of 5,000 some other figure were taken as the dividing line, particular local bodies cannot be identified as those corresponding to post and pre 26th August, 1930 unions of the Local Boards Act. The Local Boards Act, 1920 as it existed in 1949 contains no distinction between these two categories, and when the Local Boards Act was made applicable to the Pudukottai area it replaced both the Regulations IV of 1909 and III of 1925, with the result that the levy of tax under either was levy of tax under the Local Boards Act (XIV of 1920). The Agriculturists Relief Act (IV of 1938) was also extended to the State and the reference to the Local Boards Act (XIV of 1920) in the Proviso (C) became a reference to both the Regulations of Pudukottai.

There are further reasons why the argument of learned counsel for the appellant, that the relevant corresponding law of the Pudukottai State is only Regulation IV of 1909 and not Regulation III of 1925, cannot be accepted. In the first place neither Regulation proceeds on the basis that only villages or areas with a particular population fell within its scope. Taking first the Regulation IV of 1909 its preamble states "to make better provision for the sanitation and conservancy of villages." It extended to the whole of the Pudukottai State excepting the town of Pudukottai which was apparently governed by a special enactment on the lines of the Madras City Municipal Act. Section 3 (*x*) of the Regulation defines a "panchayat" as meaning a body of persons constituted for a union "under that Regulation". The substantive provision therein was to be found in section 27 which enacted :

"There shall be established for each union a panchayat, having authority over that union, and consisting of not less than five persons, who shall be called members of the panchayat".

The union was defined in section 3 (*xvi*) as meaning any revenue village or villages or any portion or portions thereof which may be declared to be union in the manner hereinafter provided. The last words were a reference to section 4 which enacted:

"4. (1) The State Council may from time to time, by notification in the State Gazette, declare any village or villages or any portion or portions thereof, to be a union for the purposes of this Regulation."

Section 5 enabled taxes on houses situated within the Union to be levied by the Panchayats. The other relevant provisions of the regulation were sections 46, 48 and 49 which ran :

"47. To enable the panchayat to carry out the purposes of this Regulation, all public roads drains, tanks, wells and other public places in the Union, unless specially excepted by the State Council, shall be under the control and direction of the panchayat".

"48. (1) The proceeds of the house-tax in any union and of any fees levied by the chairman in such union under section five clauses shall, subject to the control of the State Council, be at the disposal of the panchayat of such union."

Section 49, provided for the duties and responsibilities of the panchayat which were these :

"49. The Panchayat shall, in the union under its authority............and so far as the funds at its disposal permit, have the control and administration of, and provide for the following matters—

(*a*) the lighting of the public roads,

(*b*) cleansing the public roads, drains, tanks, wells and other public places in the union,

(*c*) with the sanction of the State Council, the establishment and maintenance of hospitals dispensaries and schools.

(*d*) making and repairing the public roads and drains in the union.

(*e*) constructing and repairing such tanks, wells and other works as will supply the inhabitants of the union with a sufficient supply of water for domestic use, and

(*f*) generally doing such things as may be necessary for the preservation of public health."

Regulation IV of 1909 was called the Village Conservancy Regulation a name whose appositeness is shown by the accent on the preservation of public health as its main function in section 49 (*f*).

We shall now refer to the relevant provisions of Regulation III of 1925, by which the local administration of Alagapuri was governed. Its preamble recited that it was to make proper provision for the administration of village affairs by the villagers themselves and thereby develop the system of self-government in the rural areas of the state. Its extent of operation was section 2 (*a*)—

"the whole of the Pudukottai State except the Municipality of Pudukottai and the unions to which the Pudukottai Village Conservancy Regulation, No. IV of 1909, applies."

Section 3 (7) defined a village as meaning

" any area declared by Government to be a village for the purposes of this Regulation ".

Section 4 enabled the Government by notification in the prescribed manner directing the constitution for any village of a panchayat or panchayats for carrying out all or any of the purposes of this Regulation. The panchayat was defined under section 3 (3) to mean

"the body of persons constituted under this Regulation for carrying out all or any of the purposes of this Regulation ".

The functions of the panchayat under the Regulation III of 1925 might now be compared with the terms of section 49 of the Regulation IV of 1909 which we have extracted earlier. Section 15 of the Regulation III of 1925 specified the following as powers and duties of these Panchayats :

(i) construction and maintenance of village roads, culverts, bridges and buildings ;

(ii) lighting of streets and public places ;

(iii) construction of drains and disposal of drainage water and sullage ;

(iv) cleaning of streets, removal of rubbish heaps and other improvements of the sanitary condition of the village.

(v) provision of public latrines.

(vi) opening and maintenance of burning ghats and burial grounds.

(vii) sinking and repairing of wells, excavation, repair and maintenance of pools or tanks for supply of water, for drinking, washing and bathing purposes, and construction of bathing ghats;

(viii) control of cattle sheds, thrashing floors, topes and other communal porombokes.

(ix) control of chavadies, chattrams, rest houses.

(x) extension of villge sites ;

(xi) enforcement of vaccination ;

(xii) registration of births and deaths;

(xiii) opening and maintenance of village libraries ;

(xiv) control of pounds ;

(xv) village protection ;

(xvi) other measures of public utility calculated to promote the safety, health, comfort or convenience of the villagers.

Sections 16 to 19 of this Regulation enabled further powers to be vested in these bodies by the State Government. Section 25 vested the body with power to levy the tax on buildings situated in the village. This analysis makes it clear that no distinction could be drawn between the bodies created by the two enactments for the purpose of showing that the body created under one corresponded to the pre 26th August, 1930 unions in the Madras State while the other fell outside that category. It is for this reason that we hold that the property or house tax levied under both these Regulations (Regulation IV of 1909 and III of 1925) is comprehended within Proviso (C) to section 3 of the Madras Agriculturists Relief Act.

Even if there were any difficulties in this interpretation of the corresponding law this in our opinion is resolved by applying the rule of construction set out in section 7 of the Merged States (Laws) Act. Mr. Bashyam Ayyangar advanced an argument that section 7 helped him but we are unable to accept this construction. The adaptation which is to be made should not be contrary to the manner in which

the State law operated before the merger and as there is no reason why the law should be different now, in the event of any ambiguity, it has to be resolved against the appellant.

The appellant, in our opinion, fell within the scope of Proviso (C) to section 3 (ii) of Act IV of 1938 and the decision of the Subordinate Judge denying him relief under section 19 of Act IV of 1938 was correct.

The appeal fails and is dismissed with costs.

R.M. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE SOMASUNDARAM.

K. G. Jaganathan .. *Petitioner.**

Railways Act (IX of 1890), section 121—Offence under—Refusal of a passenger to show the ticket when demanded—If amounts to impeding a railway servant in the discharge of his duty.

Railway Mobile Court—Procedure to be adopted by Honorary Magistrates—Examination of accused under section 342, Criminal Procedure Code (V of 1898)—Necessity for.

The refusal by a passenger alighting from a train to show his ticket when demanded by the railway servant will certainly impede the railway servant in the discharge of his duty and will amount to an offence under section 121 of the Railways Act.

In cases tried by Mobile Railway Courts, the Honorary Magistrates should follow the elementary principle of criminal procedure of questioning the accused also, after the evidence against him is recorded, with regard to the circumstances that appear against him. Otherwise the whole proceedings will be vitiated.

Petition under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the Order of the Special Honorary Presidency Magistrate, Egmore, presiding over the Railway Mobile Court at Mambalam, dated 8th May, 1957 in M.R.C. No. 2843 of 1957.

C. K. Venkatanarasimhan and *S. N. Rajan*, for Petitioner.

The Public Prosecutor (*P. S. Kailasam*) on behalf of the State.

The Court made the following

ORDER.—This is a revision against the conviction of the petitioner for an offence under section 121 of the Railways Act.

The accused is said to have got down from the train at Mambalam and when the ticket was demanded he is said to have got annoyed and refused to show the ticket. He was subsequently handed over to the Railway sainik. Two witnesses were examined in support of the prosecution who speak to the above facts. The second witness says that after refusing to show the ticket the accused went into the Station Master's room and the Ticket Examiner handed him over to the sainik. Even then he refused to show the ticket. The first witness was cross-examined as to whether he knew that the accused had luggage. Immediately an enquiry was conducted by the Special Honorary Presidency Magistrate at the Station itself and a judgment was pronounced convicting the petitioner.

Two questions arise in this case. One is whether on the facts disclosed it amounts to an offence under section 121, Railways Act. Section 121, Railways Act is as follows :—

"If a person wilfully obstructs or impedes any railway servant in the discharge of his duty, he shall be punished with fine which may extend to one hundred rupees."

The contention of Mr. Venkatanarasimhan is that the refusal to show the ticket will not fall within the scope of this section 121. It seems to me that the refusal to show the ticket will certainly impede the railway servant in the discharge of his duty. It will amount to an offence under section 121.

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*Crl.R.C. No. 621 of 1957. 16th January, 1958.
(Crl.R.P. No. 606 of 1957).

The second question is far more important, and it is one which relates to procedure. After the witnesses were examined the accused does not appear to have been questioned under section 342, Criminal Procedure Code. In fact no statement appears to have been recorded from him. I am not able to find from the records that the accused have been questioned at all, and that perhaps is the reason why no statement is recorded from him. It is an elementary principle in the procedure that the accused must be questioned with regard to the circumstances that appear against him. This is a case in which the accused has not been questioned at all. This failure to question him about the circumstances against him has vitiated the entire proceeding. For aught we know he might have a very satisfactory explanation. If the statement has been recorded then it will be a matter for consideration, whether from the statement and the prosecution evidence, it can be stated that the offence has been made out or not. In the absence of any such statement which should have been recorded, but not recorded, I am unable to know what the defence is and the accused is not to be blamed for this failure on the part of the Court to question him and record his statement. This is an illegality which cannot be cured by section 536.

The conviction and sentence are, therefore, set aside and the fine if paid will be refunded.

The Special Honorary Presidency Magistrate will do well to follow the procedure. The Honorary Magistrate must remember that one of the elementary principles that must be observed is that after the evidence is taken the accused also must be questioned on the evidence as to what he has got to say. Failure to do so is an illegality which will vitiate the entire trial.

R.M. ——— *Conviction and sentence set aside.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE SOMASUNDARAM.

Govilan .. *Accused**.

Motor Vehicles Act (*IV of* 1939), *section* 130 (1) *and Penal Code* (*XLV of* 1860), *section* 279—*Prosecution for an offence of rash and negligent driving under section* 279, *Penal Code*—*If could be proceeded under section* 130 (1) *of the Motor Vehicles Act.*

Section 130 (1) of the Motor Vehicles Act provides for a particular manner of disposal of certain prosecutions under the Act (*viz.*) by the accused pleading guilty and remitting the fine indicated in the summons. But this provision cannot apply to prosecutions for rash and negligent driving under section 279, Indian Penal Code. Section 130 (1) of the Motor Vehicles Act can apply only to cases where an offence is committed under that Act and the offence is not one falling under Part A of Schedule V of that Act.

Case referred for the orders of the High Court under section 438 of the Criminal Procedure Code, by the District Magistrate, South Arcot at Cuddalore in his letter dated *nil* in Criminal Revision Case No. 5 of 1957.

S. V. Rama Ayyangar, for the Accused.

V. V. Radhakrishnan for the Public Prosecutor (*P. S. Kailasam*) on behalf of the State.

The Court made the following

ORDER.—This is a reference by the District Magistrate of South Arcot under the following circumstances. The Police at Chidambaram filed a charge-sheet against the respondent herein, stating that he has committed an offence under section 279, read with section 112 of the Motor Vehicles Act. The allegations are that the accused who was the driver of lorry M.S.Y. 2590 drove the lorry on 16th March, 1957 in a rash and negligent manner so as to cause danger to human life at about 0-53 hours in the Chidambaram Bhengiri Road near 1 mile and 4 furlongs

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* Crl.R.C. No. 445 of 1957. 6th January, 1958.
(Case Referred No. 7 of 1957.)

from Chidambaram and thereby dashed against a double-bullock cart and caused damage to the cart driven by one Nathar P.W. 1. It is stated that this act fell under section 279 Indian Penal Code and section 112 of the Motor Vehicles Act. There is no doubt that the police were wrong in adding section 112 of the Motor Vehicles Act to this section 279, Indian Penal Code. Section 279, Indian Penal Code, is as follows :—

"Whoever drives any vehicles, or rides, on any public way in a manner so rash or negligent as to endanger human life, or to be likely to cause hurt or injury to any other person, shall be punished with imprisonment of either description for a term which may extend to six months or with fine which may extend to one thousand rupees, or with both".

This is a self-contained section like any other section of the Indian Penal Code, prescribing the extent of punishment. This being independent by itself, there is no meaning in connecting it or reading it with section 112 of the Motor Vehicles Act. Section 112 of the Motor Vehicles Act, as amended now, is as follows :—

"Whoever contravenes any provisions of this Act or of any rule made thereunder shall, if no other penalty is provided for the offence, be punishable with fine which may extend to one hundred rupees, or, if having been previously convicted of any offence under this Act he is again convicted of an offence under this Act, with fine which may extend to three hundred rupees."

This section would therefore apply to offences not only under the Motor Vehicles Act, but also for breach of provisions, the punishment for which is not provided for under those provisions. A reading, therefore, of section 112 of the Motor Vehicles Act and section 279, Indian Penal Code, will clearly show that section 112 of the Motor Vehicles Act cannot be read with section 279, Indian Penal Code. However, the police committed this mistake in filing the charge-sheet in the manner stated above, quoting the two sections together.

After filing the charge-sheet, the lower Court appears to have acted under section 130 (1) of the Motor Vehicles Act. Under section 130 (1) of the Motor Vehicles Act, a Court taking cognizance of an offence under this Act may, unless the offence is an offence specified in Part A of the Fifth Schedule, state upon the summons to be served on the accused person that he (*a*) may appear by pleader and not in person, or (*b*) may by a specified date prior to the hearing of the charge plead guilty to the charge by registered letter and remit to the Court such sum not exceeding Rs. 25 as the Court may specify. Apparently, the summons has specified a sum of Rs. 25, and in pursuance of the option in the summons, the accused pleaded guilty, and thereupon was convicted and sentenced to a fine of Rs. 25.

Neither the Magistrate nor the police appear to have looked into the sections of the Indian Penal Code or the Motor Vehicles Act, the one before filing the charge-sheet and the other before sending out a summons. It is obvious that section 130 (1) cannot apply to the facts of this case, as it can apply only in two circumstances: (1) it must be an offence committed under Motor Vehicles Act, and (2) such offence not mentioned in Part A. This offence, being one under section 279, Indian Penal Code, cannot be said to be under the Act, and therefore section 130 (1) will not apply. The issue of summons itself was therefore contrary to the provisions of the section and must be held as illegal. The plea of guilty, therefore, following such summons is equally vitiated by this illegality. The whole course of trial being illegal, the conviction of the accused has to be set aside, and it is hereby set aside.

The next question is whether there should be a re-trial. Undoubtedly, there was damage caused to the cart of P.W. 1 on account of the rash and negligent driving of the lorry by the accused. In view of the notorious tendencies on the part of lorry-drivers to drive in a rash and negligent manner, I should think that the ends of justice require that the accused must be put on trial again. I therefore set aside the conviction and sentence, and order a re-trial of the accused for an offence under section 279, Indian Penal Code. A fresh summons will issue for an offence under section 279, Indian Penal Code, and there should be no reference in the summons to section 112 of the Motor Vehicles Act. The reference is accepted.

R.M. — *Reference accepted.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE SOMASUNDARAM.

Raman *alias* Kottooran .. *Petitioner**.

Cattle Trespass Act (I of 1871), sections 11 and 24—Applicability to trespass on Reserved Forest land.

Criminal trial—Practice—Excusing delay in filing appeal against acquittal—Right of the accused to contest.

Though in terms of the section, section 11 of the Cattle Trespass Act cannot apply to cases of trespass on Reserve Forest land, the provisions of the said section are attracted to such cases by virtue of section 57 of the Madras Forest Act and as such an accused can be convicted under section 24 of the Cattle Trespass Act for allowing cattle to trespass on Reserved Forest land.

Normally in criminal cases any delay in filing an appeal cannot be excused without notice to the respondent as he cannot be deprived of the valuable right which he has acquired by the expiry of the period of limitation. But in cases where the delay is excused without notice to the other side, it is open to the respondent at the time of the final hearing to raise the question of delay and show that there was no justifiable ground to excuse the same.

The mere fact that an appeal against the acquittal was sought to be filed after the expiry of the period of limitation as a result of the attention of the Public Prosecutor being drawn to the matter in Court in a connected proceeding, is no ground by itself to excuse the delay.

Petition under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the Judgment of the Court of the Additional First Class Magistrate, Vellore, in C.C. No. 224 of 1956.

G. Gopalaswami and *V. Gopinathan*, for Petitioner in Cr.R.C. No. 141 of 1957 and Respondent in Cr. App. No. 263 of 1957.

The Public Prosecutor (*P. S. Kailasam*) for Respondent in Cr.R.C. 141 of 1957 and Appellant in Cr. App. No. 263 of 1957.

The Court delivered the following

JUDGMENT.—Criminal Revision Case No. 141 of 1957 is by the accused against his conviction for an offence under section 24 of the Cattle Trespass Act. Criminal Appeal No. 263 of 1957 is by the State against the acquittal of the accused for an offence under section 332, Penal Code, with which he was also charged. On 28th August, 1956, the Forest Guard P.W. 1 in the beat of Gudiyatam range and the Forest Watcher P.W. 2 working with P.W. 1 saw at about 12 noon some goats grazing in the Reserved Forest. There were about 67 goats grazing and two persons were grazing them. They rounded up the goats for the purpose of taking them to the pound. The two servants shouted and the accused who presumably was the owner of the goats rushed with a knife in his hand and threatened the two officers with severe penalty if they took the goats to the pound. It is alleged that the accused caught hold of the neck of P.W. 1 and pushed him down and threatened to cut him with the knife. P.W. 1 sustained undoubtedly minor injuries which were noticed by P.W. 6 the doctor who examined him the next day at 11 A.M. on a requisition from P.W. 5 the Sub-Inspector of Police. P.W. 1 gave a complaint to P.W. 3, the Range Officer, Gudiyatam, the same night setting out substantially the allegations mentioned above. Subsequently also he appears to have given a complaint to P.W. 4 the cattle pound keeper. The complaint given to P.W. 3 was forwarded by him in due course to the Police for investigation and the Police after investigation filed a charge-sheet against the accused for an offence under section 332, Penal Code and also for an offence under section 24 of the Cattle Trespass Act. The Additional First Class Magistrate who tried the case acquitted the accused of the offence under section 332, Penal Code but convicted him of the offence under section 24 of the Cattle Trespass Act. It is against this conviction that the revision has been preferred and subsequent to the admission of this revision it transpires both from the records and the statement made by the Public Prosecutor that the Public Prosecutor was asked as to whether the State was filing an appeal against the acquittal. Thereafter according to the usual practice the records are forwarded to the Public Prosecutor who goes into the whole question and gives his opinion to the Government. Apparently on the

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*Crl. R.C. No. 141 of 1957. 10th December, 1957.
(Crl.R.P. No. 138 and Crl.Ap. No. 263 of 1957).

opinion furnished by the Public Prosecutor the Government instructed the Public Prosecutor to file the appeal against acquittal. Instructions were received by the Public Prosecutor on 26th March, 1957, the judgment of the lower Court was on 6th November, 1956. The time for filing an appeal against the acquittal is three months. There is no doubt that this appeal was filed beyond time. At the time of the filing the appeal, a petition to excuse the delay was filed supported by an affidavit of one of the clerks in the office of the Public Prosecutor. The delay in filing the appeal was excused by the admission Court without notice to the respondent. Both the revision and the appeal have been posted together and have come up before me for final hearing and disposal.

So far as the revision is concerned, the question of law raised by Mr. Gopalaswami appearing for the petitioner is that the conviction under section 24 of the Cattle Trespass Act is unsustainable in view of the provision namely that under the section it is only when cattle are seized under the Cattle Trespass Act that section 24 would apply. Sections 10 and 11 provide for the circumstances under which cattle under the Act can be seized. In terms section 11 cannot be applied because section 11 says that

> "persons in charge of public roads, pleasure grounds, plantations, canals. . . . and Police officers, may seize, or cause to be seized any cattle doing damage to such roads, grounds, plantations canals, etc."

The forest cannot be said to be a plantation within the meaning of section 11.. Nor has any damage as such been proved in the case. But as pointed out by the learned Public Prosecutor, under section 57 of the Madras Forest Act, 1882,

> "Cattle trespassing in a Reserved Forest or on lands on which the grazing of cattle has been prohibited by rules made under section 26, or which has been closed under section 27, shall be deemed to be cattle doing damage to a public plantation within the meaning of the section 11 of the Cattle Trespass Act, 1871, and may be seized and impounded as such by any Forest Officer or Police Officer."

Section 11 of the Cattle Trespass Act is therefore attracted by the provisions of this section and any cattle trespassing in a Reserved Forest will be deemed to be cattle doing damage to a public plantation within the meaning of section 11 of the Cattle Trespass Act and may be seized and impounded by any Forest Officer. If therefore cattle trespassing in a Reserved Forest falls within the provisions of section 11 of the Cattle Trespass Act, it is not disputed that section 24 will apply to the same as section 24 itself clearly emphasises the fact that whoever forcibly opposes the seizure of cattle liable to be seized under the Act may be convicted by a Magistrate.

Another contention raised by Mr. Gopalaswami is that under section 58:

> "The Government may, by notification in the Official Gazette, direct that, in lieu of the fines fixed by the twelfth section of the Act . . . there shall be fixed, in all or any of the areas to which this Act applies, for each head of cattle impounded under section 57 of this Act, such fines as they hink fit, but not exceeding the following. . . . . ."

The officer can only levy the fine and cannot convict him. But a reading of the fines in that section will clearly show that the section is intended to levy a fine by the keeper of the pound. Section 12 does not deal with animals mentioned in section 58. It seems to me that section 58 of the Madras Forest Act does not apply to the facts of this case. The Forest Officer can seize the cattle and send them to the pound which would be dealt with according to the rates mentioned in section 58 or in section 12 as the case may be. The contention of Mr. Gopalaswami therefore fails and the conviction is justified. The fine cannot be said to be excessive and therefore is not reduced. The Criminal Revision is dismissed.

As regards the appeal, initially no appeal was filed by the State, but because the acquittal came to the notice of a Judge who felt that it was wrong. Consistent with the practice of this Court, the judgment was forwarded to the Public Prosecutor to ascertain whether an appeal is instituted by the State. Thereupon the Public Prosecutor goes into the merits and advices the Government and on the advice the appeal is or is not filed as the case may be. Here obviously the Public

Prosecutor has advised an appeal to be filed. The State Government thereupon instructed the Public Prosecutor to file an appeal. This is how the appeal came to be filed. The judgment of the Court against which the appeal is filed was on 6th November, 1956 and the appeal was filed on 12th April, 1957, which is far beyond the period of limitation prescribed under the Limitation Act. The only reason given is, as already stated, that

> " the judgment was forwarded by the High Court to the Public Prosecutor on 15th March, 1957. to ascertain whether the Public Prosecutor is filing an appeal against the acquittal of the accused under section 332, Indian Penal Code and the papers were forwarded to the Government with the opinion of the Public Prosecutor. They were received back only on 26th March, 1957 ".

The Court when it came up for admission excused the delay without giving notice to the respondent. As pointed out in *Krishnaswami Panikondar* v. *Ramaswami Chettiar*[1], the delay should not be excused without giving notice to the respondent because after the period of limitation the respondent acquires a valuable right and it cannot be deprived without notice to him. In the above case their Lordships of the Privy Council point out :

> " . . . . . in terms it purported to deprive him of a valuable right, for it put in peril the finality of the decision in his favour, so that to preclude him from questioning its propriety would amount to a denial of justice. It must, therefore, in common fairness be regarded as a tacit term of an order like the present that though unqualified in expression it should be open to re-consideration at the instance of the party prejudicially affected ; and this view is sanctioned by the practice of the Courts in India ".

In that particular case the delay was excused in the first instance without notice to the other side. At the time of the final hearing of the appeal the point was raised and the Bench which heard the appeal went into the question and found that there was no justifiable ground for excusing the delay and therefore dismissed the appeal. Their Lordships of the Privy Council upheld that practice and held that it was open to the respondent to raise this question at the time of the final hearing of the appeal if the delay was excused without notice to him. Similarly the question of excusing the delay without notice to the respondent is raised before me at the time of the final hearing of the appeal. If it was open to the respondent to raise this question I am bound to consider the grounds urged by the learned Public Prosecutor for excusing the delay. It seems to me that this is not a fit case in which the respondent should be deprived of the valuable right accrued to him without a proper reason urged for it. The reasons given by the Public Prosecutor are what I have stated earlier. I do not think that the circumstance of filing an appeal after the attention of the Public Prosecutor is drawn to it in Court as in the present case can be said to be a ground for depriving the valuable right accrued to the accused. I uphold the contention of the respondent that it was open to him to raise this plea namely that in the circumstances it was not a justifiable ground to excuse the delay. The delay is therefore not excused. The appeal is dismissed for that reason. In this view, it is unnecessary to go into the merits of this appeal.

Both the appeal and the revision are dismissed.

R.M. *Appeal and revision dismissed.*

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1. (1917) 34 M.L.J. 63 : L.R. 45 I.A. 25 : I.L.R. 41 Mad. 412 (P.C.).

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE RAJAGOPALA AYYANGAR.

A.S.N.S. Naina Pillai Marakkayar .. *Petitioner**

v.

State of Madras by Secretary, Revenue Department, Madras .. *Respondent.*

Madras Hindu Religious and Charitable Endowments Act (XIX of 1951), section 3—Validity—If void as amounting to excessive delegation of legislative power —If opposed to Article 14 of the Constitution of India.

The Madras Hindu Religious and Charitable Endowments Act, 1951, comprehends within its scope both religious and charitable endowments. The enactment, no doubt, contains elaborate provisions for supervision, control, etc., to secure proper administration of religious institutions and endowments. With reference to charitable endowments, however, the Legislature felt that the provisions of the Act need be applied only to those charitable endowments whose affairs were mismanaged. Hence, section 3 of the Act has been enacted vesting with the Government the necessary powers to bring in such cases within the ambit of the Act. It cannot be said that the delegation is excessive or invalid. Nor does the section offend Article 14 of the Constitution of India merely because it is only enabling and there is no compelling duty enjoined on the Government to take action in every case of mismanagement of a charitable endowment.

Petition under Article 226 of the Constitution of India, praying that in the circumstances stated therein, and in the affidavit filed therewith the High Court will be pleased to issue a writ of *certiorari* calling for the Records in Memorandum No. 116907-D/55-3 dated 21st March, 1956, on the file of the Revenue Department, Government of Madras and quash the said notification relating to the Annapoorni Amman Chatram Dharmam Charities, Mettupalayam village, Tanjore District.

G. R. Jagadisan, for Petitioner.

The Additional Government Pleader (*K. Veeraswami*) for the State.

The Court made the following

ORDER.—The petitioner challenges the constitutional validity of section 3 of the Madras Hindu Religious and Charitable Endowments Act (XIX of 1951) in this petition invoking the jurisdiction of this Court under Article 226 of the Constitution.

Section 3 of the Act XIX of 1951 (which I shall call the impugned section) enacts :

"Where the Government have reason to believe that any Hindu or Jain public charitable endowment is being mismanaged and are satisfied that in the interest of the administration of such charitable endowment it is necessary to extend thereto all or any of the provisions of this Act and of any rules made thereunder, they may, by notification in the *Fort St. George Gazette*, extend to such charitable endowments the said provisions and thereupon the provision so extended shall apply to such charitable endowments as if it were a specific endowment:

Provided that before issuing such a notification, the Government shall publish in the *Fort St. George Gazette*, a notice of their intention to do so, specifying the reasons for the action proposed to be taken by them and fixing a period which shall not be less than two months from the date of publication of the notice, for the persons interested in the endowment concerned to show cause against the issue of the notification, and consider their objections, if any".

The petitioner claims to be the trustee of a charitable endowment known as Annapoorani Amman Chatram Dharmam. The petitioner has been in management of this trust for a considerable time and acting in pursuance of the provisions of section 3 extracted earlier, the State Government issued a notice to the petitioner to show cause why Act XIX of 1951 and the Rules made thereunder should not be extended to the Dharmam of which he was in management for the reason that the endowment was being mismanaged by him. The petitioner has thereupon moved this Court by the Writ Petition now before me and obtained a rule *nisi* and also orders of stay directing the Government not to proceed further with the enquiry into the misconduct charged.

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*W.P. No. 875 of 1956. 9th October, 1957.

Mr. Jagadisa Ayyar, learned counsel for the petitioner, formulated the following in support of his attack on the validity of this provision.

(1) Section 3 constituted an unconstitutional and excessive delegation of legislative power virtually amounting to an abdication by the Legislature of its power over the subject.

(2) The provision offended Article 14 of the Constitution.

Learned counsel sought to sustain the plea of excessive delegation under two heads: (*a*) that the Act did not formulate any policy to be applied and that it did not lay down any principles for the Government to adopt but had merely left the entire field open for executive action. This, learned counsel contended was an abdication of the legislative function by the law-making body; (*b*) that section 5 of the Act effected repeals of the enactment set out there in case where the Act applied and that as Government were vested with the power to apply the Act to particular institutions section 5 in effect enabled the executive to repeal laws which were applicable to such institutions before the date of the notification under section 3.

I shall deal with these two contentions in that order, The steps in the reasoning of learned counsel on which the first of these points was urged were these. Section 1 (2) of the Act limits the operation of the enactment to all Hindu public religious institutions and endowments and therefore not to public charitable endowments. It is section 3 which enables the Government to extend the provisions of the Act to public charitable endowments. The extension of the Act therefore to the Hindu public charitable endowments is not by any act of the Legislature but by virtue of what might be termed executive legislation. This it was said was excessive delegation. I feel wholly unable to accept this argument. In the first place the Preamble as well as the Short title of the Act make it clear that the legislation comprehended both religious and charitable endowments. The Short title of the Act is "The Madras Hindu Religious and Charitable Endowments Act, 1951" and the Long title is

"An Act to provide for the better administration and goverance of Hindu religious and charitable institutions and endowments in the State of Madras."

The Preamble follows the Long title by stating that it was expedient to amend and consolidate the law relating to the administration and governance of Hindu religious and charitable institutions in the State of Madras. That the legislation comprehended within its scope charitable endowments is therefore beyond question. The enactment no doubt primarily and of its own force applied to Hindu religious institutions and endowments. In regard to them detailed provisions are made for supervision over such endowments and for securing due and proper administration of their affairs. That is the framework and the embodiment of legislative policy in relation to such institutions. The Legislature did not consider it expedient or necessary to bring within the scope of the enactment every charitable endowment but considered that it was sufficient if the provisions of the Act were applied to those charitable endowments whose affairs were mismanaged. Naturally some authority had to be created vested with power to find out those cases of charitable endowments whose affairs were mismanaged. The executive Government was vested with this power under section 3. It was for the Legislature to determine the authority to be invested with such power, and so no objection, could be taken on the score that the Government were chosen for that purpose. In my judgment the validity of this delegation in the present case is so clear, as to render it unnecessary to cite any authority but as the matter was argued at some length, I would refer to the decision of the Supreme Court in *Edware Mills* v. *State of Ajmer*[1], and particularly the passage at pages 747 to 750 as applying to the present case. The case on hand is just in line with the case before the Supreme Court where their Lordships had to deal with the validity of the prescription of employments by the appropriate Government, so as to bring them within the provisions of the Minimum Wages Act. I have therefore no hesitation in repelling this contention urged on behalf of the petitioner.

1. (1955) S.C.J. 42 : (1955) 1 M.L.J. (S.C.) 1 : (1955) 1 S.C.R. 735.

Point (*b*) has even less substance than the first. Section 5 no doubt effects the repeal of the enactments set out in their application to institutions and endowments brought within the scope of the Act. It is not disputed that this repeal was within the power of the Legislature. When by a proper legislative delegation the State Government are vested with power to extend the operation of Act XIX of 1951 to particular institutions section 5 would certainly be attracted to those institutions and to the extent to which provisions of this Act are made applicable to such endowments the enactments mentioned in section 5 would cease to apply or would be overborne. But this effect is not by virtue of the "legislative act" of the Government in notifying the institution but because the Legislature has so provided. It would be a true case of a conditional legislation which is within the powers of the Legislatures in India.

The next head of objection was based on the power conferred by section 3 being obnoxious to Article 14 of the Constitution. The point was put this way, To start with it was urged that the expression "mismanaged" was vague and lacked precision and was open to the construction that a subjective satisfaction by the Government of this vague requirement was sufficient to enable the Government to issue this notification. The power was thereby stated to be affected by the vice of arbitrariness. I feel unable to accept this argument which rests primarily on the word "mismanagement" being a term of indefinite import. In my judgment "mismanagement" indicates improper management or management in a manner not in conformity with the law, in accordance with the intentions of the founder or in the interests of the institution. This is certainly not vague. It is well known to the law, as a ground for action against persons in possession of funds in a fiduciary capacity. Of course Government had to be satisfied that there was "mismanagement" before they could take action under section 3 but this surely cannot render the law permitting such action arbitrary within Article 14. This point about Article 14 was presented in a slightly different form by stating that the Government were not on the terms of section 3 bound to take action in every case of mismanagment and they might pick and choose institutions to which they might make the provisions of the Act applicable. I am unable to uphold this objection either. Under the terms of section 3 it is only if the Government were satisfied that an endowment was mismanaged and that in its interest the provisions of the Act should be made applicable that they are directed to issue the notification. None is precluded from bringing to the notice of the Government the mismanagment of any institution and it is only if they are satisfied that they are enabled to do so. The argument of learned counsel would really mean that every enabling power was necessarily violative of Article 14 and that to satisfy the requirement of the Article there must be a compellable duty enjoined upon the authority. This proposition has only to be stated to be rejected and I do not think that it merits further consideration.

The petition fails and is dismissed. This rule is discharged. There will be no order as to costs.

R.M. *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE PANCHAPAKESA AYYAR.

Sinnapappal *alias* Sinnakaliakkal .. *Petitioner**

v.

Subbanna Goundan and others .. *Respondents.*

Court-Fees—Computation of—Appeal against an order determining mesne profits—Court-fee—If payable on ad valorem *basis.*

Civil Procedure Code (V of 1908), section 47 and Order 20, rule 12—Determination of mesne profits—Procedure.

Under the Code of Civil Procedure, 1908, as it stands now mesne profits have to be ascertained only in an application under Order 20, rule 12 and not in execution under section 47. An appeal filed against an order ascertaining the quantum of mesne profits has to be valued on the amount of the

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*C.R.P. No. 1182 of 1955. 10th October, 1957.

mesne profits in dispute and Court-fee should be paid *ad valorem* on such amount. The fact that the mesne profits were ascertained in execution proceedings makes no difference as it is the substance of the matter and not the procedure adopted that would decide the quantum of Court-fee chargeable.

Balarama Naidu v. *Sangan Naidu* (1921) 42 M.L.J. 184 : I.L.R. 45 Mad. 280, and *Varadarajulu Naidu* v. *Perumal Naidu* (1957) 2 M.L.J. (N.R.C.) 48, followed.

Balaramacharya v. *Chidambaragowda*, A.I.R. 1938 Bom. 320, differed.

Petition under section 115 of Act V of 1908, praying the High Court to revise the order of the District Court of Coimbatore, dated 13th September, 1955, requiring the payment of *ad valorem* Court-fee on the memorandum of appeal filed against E.P. No. 1165 of 1953 in O.S. No. 406 of 1942 on the file of the Court of the District Munsif of Gobichettipalayam.

R. Ramamurthi Ayyar, for Petitioner.

A. R. Ramanathan, for Respondent No. 1.

S. Tyagaraja Ayyar, for Respondents Nos. 4 and 12.

The Additional Government Pleader (*K. Veeraswami*) for the State.

The Court made the following

ORDER.—This is a petition by one Sinnapappal *alias* Sinnakaliakkal for revising and setting aside the order of the District Judge of Coimbatore, dated 13th September, 1955, in an unnumbered appeal by her against mesne profits of Rs. 9,766 found as due by her in respect of certain property under a decree of this Court, directing her to pay *ad valorem* Court-fee of Rs. 712-7-0 instead of the Court-fee of one rupee she had paid, as on an appeal against an order under section 47, Civil Procedure Code, taking refuge in the fact that the mesne profits were determined in E.P. No. 1165 of 1953, in O.S. No. 406 of 1942 by the District Munsif of Gobichettipalayam who was in this case the person who could hear and determine the Execution Petition as well as hear and determine a petition under Order 20, rule 12, Civil Procedure Code, for mesne profits.

The petitioner had contended before the learned District Judge that as a Bench of this Court had, in S.A. No. 429 of 1946, decided on 11th April, 1949, observed that so far as the properties in S.A. No. 429 of 1946 were concerned, the plaintiffs would be entitled to mesne profits at a rate to be ascertained in execution proceedings from the date mentioned in the plaint, and as the District Munsif, Gobichettipalayam, had determined the mesne profits to be Rs. 9,766 in E.P. No. 1165 of 1953 in O.S. No. 406 of 1942, in consequence of this direction, the ruling of Beaumont, C.J., in *Balaramacharya* v. *Chidambaragowda*[1], would come into operation and entitled the petitioner to pay a Court-fee of only one rupee as in the case of an appeal against an order under section 47, Civil Procedure Code.

The learned District Judge repelled this plea, and held that *ad valorem* Court-fee would be due, as the appeal was against the quantum of the mesne profits awarded and the proper forum for determining mesne profits was Order 20, rule 12, Civil Procedure Code, and the determination of the mesne profits, in the E.P. must therefore, be held in substance to be one in a petition under Order 20, rule 12, Civil Procedure Code, and the appeal must, therefore, by valued *ad valorem* at Rs. 712-7-0 instead of at one rupee. So he returned the appeal memo. to the petitioner and directed the deficit Court-fee to be paid before the appeal was numbered. Hence this Civil Revision Petition.

I have perused the records, and heard the learned counsel for the petitioner, and the learned Additional Government Pleader *contra*. Mr. R. Ramamurthy Ayyar, for the petitioner, could not adduce any authority for holding that even now, after the amendment of section 47, mesne profits could be determined in *execution proceedings* instead of in a petition under Order 20, rule 12, Civil Procedure Code. Beaumont, C.J., himself in the decision relied upon by him, has held that it is only formerly, and before the amendment, that that was permissible, and that *now* mesne profits have to be ascertained in a petition under Order 20, rule 12, Civil Procedure Code. To quote his words,

"so that, the correct procedure under the present Code is for the Court to direct an enquiry as to the mesne profits and then pass a final decree for the amount found due on the enquiry."

1. A.I.R. 1938 Bom. 329.

Beaumont, C.J., went on to observe further, no doubt, that because of the High Court having directed the mesne profits to be ascertained in *execution proceedings*, and because the mesne profits were actually ascertained in execution proceedings, the person subjected to such mesne profits could take advantage of this error and pay Court-fee and appeal as if it is an appeal against an order under section 47, Civil Procedure Code.

This decision of a single Judge of the Bombay High Court, however eminent, on that narrow point has not been followed by this Court in any decision brought to my notice. Indeed a Bench decision of this Court in *Balarama Naidu* v. *Sangan Naidu*[1] relied on by the learned Additional Government Pleader shows that even if the mesne profits are decided in an *Execution Application* in an Original Suit, *ad valorem* Court-fee should be charged under Article 1 of Schedule I of the Court-Fees Act, calculated on the amount of mesne profits in dispute in the appeal. This Bench decision of this Court will certainly take precedence over the decision of a single Judge of the Bombay High Court, however eminent. I may add that the learned Additional Government Pleader has also brought to my notice a recent decision of Ramaswami, J., in *Varadarajulu Naidu* v. *Perumal Naidu*[2], reiterating the view taken by a Bench of this Court. I have also no doubt whatever that the view taken by the two decisions of this Court is the only view possible under the law as it stands. Where the law holds that mesne profits should be determined only in a petition under Order 20, rule 12, Civil Procedure Code, and that it should be followed by a final decree, and that an appeal should be valued *ad valorem* on the amount of the mesne profits in dispute, I hold, with respect, that any observation in a judgment of this Court, that the mesne profits should be determined in *execution*, cannot enable the party filing the appeal against the quantum of the mesne profits, so determined in execution, to escape by paying a Court-fee of one rupee where a Court-fee of Rs. 712-7-0 is required, under the law, as *ad valorem* Court-fee on the disputed amount of Rs. 9,766, taking refuge in the argument that because of the observation in this Court's judgment, and the determination of the mesne profits in an Execution Petition; the appeal can be valued at one rupee, as if it were an appeal against an order under section 47, Civil Procedure Code. No High Court has got the power to allow a person to pay one rupee as Court-fee, when the law (the Court-Fees Act) requires the payment of Rs. 712-7-0. That will be making a gift of Rs. 711-7-0 to a litigant at the expense of the State, which I submit no High Court or other Court can do. Mr. Ramamurthy Ayyar could not show how any observation in a High Court's judgment can overrule the Court-Fees Act, or Order 20, rule 12, Civil Procedure Code, or other provision of law. The principle of the benefit of equal laws, and equality before the law, guaranteed by the Constitution, will also be affected by such discrimination in favour of any non-pauper litigant. It appears to me that, in modern times, we need not pay much heed to such formal matters as whether the mesne profits are determined in *an execution petition, execution application* or *interlocutory application*. We should look *into the substance of the matter*. Looking into substance, like that, it is clear that mesne profits should be determined nowadays *only in a petition under Order* 20, *rule* 12, *Civil Procedure Code* and an appeal by the party affected should be valued *ad valorem* on the amount of mesne profits he disputes liability for. It is not the case here that an executing Court different from the Court which passed the decree, and *having no jurisdiction to* determine the mesne profits under Order 20, rule 12, Civil Procedure Code, went into the matter in an execution petition, and determined the mesne profits without jurisdiction. It is admitted that the District Munsif, Gobichettipalayam, was both the Court which passed the decree and the Court which heard the Execution Petition and determined the mesne profits. So it is only *a formal matter* of determining the mesne profits *in an execution petition* instead of in an interlocutory application under Order 20, rule 12, Civil Procedure Code.

It follows from all this that the learned District Judge was perfectly right in his order, and that the deficit Court-fee demanded by him as due ought to be paid to the last pie.

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1. (1921) 42 M.L.J. 184 : I.L.R. 45 Mad. 280. 2. (1957) 2 M.L.J. (N.R.C.) 48.

His order is confirmed, and this Civil Revision Petition is dismissed, but, in the peculiar circumstances, without costs. Two months' time from to-day is granted to the petitioner for paying the deficit Court-fee. The appeal papers will be returned at once to the petitioner, to whom the lower Court had returned them for paying a deficit Court-fee. The petitioner will have to re-present the papers to the lower Court with the defiict Court-fee within the time fixed, if the appeal is to be numbered.

R.M. — *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE PANCHAPAKESA AYYAR AND MR. JUSTICE GANAPATIA PILLAI.

M. K. Chengalvaroya Chetty .. *Appellant**

v.

State of Madras, by Collector of Madras .. *Respondent.*

Madras Town Planning Act (VII of 1920), section 12—Acquisition of land—Power of Government to extend the time fixed under—Effect of such extension—Quantum of compensation—Crucial date to decide.

It is no doubt true that the State Government has the power to extend by notification the time originally fixed under section 12 of the Madras Town Planning Act for purposes of land acquisition as this is only a simpler form of issuing a fresh notification which power they undoubtedly possess. But if the Government resorts to any extension of the time originally fixed, then the market value of the property sought to be acquired has to be decided for purposes of ascertaining the compensation as on the date of the last order of extension and not the date originally fixed. A.S. No. 757 of 1950, followed.

Secretary of State for India v. *Narayanaswami Chettiar*, (1931) I.L.R. 55 Mad. 391 ; and *Radhakrishna Chettiar* v. *State of Madras*, (1956) 2 M.L.J. 279, followed.

Appeal preferred to the High Court against the Decree of the Chief Judge, Court of Small Causes, Madras, dated 29th September, 1953 and passed in Land Case No. 133 of 1952.

M. Natesan, V. N. Shama Rao, S. Padmanabhan, M. Ranganatha Sastri, M. V. Kapali, G. Ramanujam, Subramaniam and Rajagopal and *K. G. Manickavasagam*, for Appellant.

The Government Pleader (*B. V. Viswanatha Ayyar*), *M. A. Sathar Sayeed, G. K. Raman* and *C. Rangaswami Ayyangar*, for Respondent.

The Judgment of the Court was delivered by

Panchapakesa Ayyar, J.—This batch of appeals has been filed against the judgment of the Chief Judge of the Court of Small Causes in Land Case Nos. 133, 106, 112, 111, 107, 116, 113, 100 and 102 of 1952, valuing the lands acquired under the Land Acquisition Act, as modified by the Town Planning Act, with No. 15 (solatium) as on 14th August, 1934, the date of the notification under section 12 of the Town Planning Act, instead of on the date of the last extension by Government of that notification, namely, 24th October, 1946. The acquisition was for the laying of scheme roads under the Mylapore western section area Town Planning Scheme.

We have perused the records and heard the learned counsel for the appellants, and the learned Government Pleader *contra*. The main contention of the learned counsel for the appellants was that the Government had no power to extend the time fixed under section 12 of the Town Planning Act and that if the Government is to be held by an indulgence, to have the power to extend the time fixed under section 12, as has been held by Ramesam, Officiating Chief Justice, in the Bench ruling in *Secretary of State for India* v. *Narayanaswami Chettiar*[1], (the other learned Judge was Cornish, J.) it could only be because they had the power to issue a fresh notification and took the short out of doing it by a mere order of extension, taking all the legal consequences of a fresh notification under section 12 including the liability to pay the market value as on the date of the last extension for the purpose of section 35 (2) of the Town Planning Act, and as per the view taken by Rajagopala Ayyangar, J., in *Rathakrishna Chettiar* v. *State of Madras*[2] and as directly held by a Bench of this Court consisting of Subba Rao and Ramaswami, JJ., in A.S. No. 757 of 1950 after the delivery of the judgment now appealed against. It was urged that the learned

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*Appeals Nos. 137, 170 to 173, 257, 329, 509 and 635 of 1954. 29th November, 1957.

1. (1931) I.L.R. 55 Mad. 391. 2. (1956) 2 M.L.J. 279.

Judge below erred in not waiting for a few days for the Bench judgment, though requested and took a wrong view.

We may add here that the learned counsel for the appellants conceded that the judgments of Ramesam, Officiating Chief Justice and of Rajagopala Ayyangar, J., would amount only to *obiter* and that Cornish, J., dissented from the view on Ramesam Officiating Chief Justice, and held that only the market value of the original date of the notification under section 12 could be claimed. He submitted the Bench decision was a direct decision on the point, It was contended by the learned counsel for the appellants that the prices were steadily rising from 1934 onwards and that the prices on 24th October, 1946, were four or five times higher than the prices on 14th August, 1934. Of course possession has not been taken, as the acquisition is only under the Town Planning Act, and not under the Land Acquisition Act.

Learned Government Pleader would not concede that prices had risen to any extent by 24th October, 1946. He said that the 1934 prices continued. We need not decide that question, in these appeals, as if we come to the conclusion that the market value has to be fixed under section 35 (2) of the Town Planning Act as on 24th October, 1946, as per the decision of the Bench and the observations of Ramesam, Officiating Chief Justice, and Rajagopala Ayyangar, J., the matter will have to be remanded to the lower Court for hearing the evidence and determining the point, which has not been done, as the lower Court took it for granted that only the market value as on 14th August, 1934, would be payable. So, too, the claims regarding the damage for erections, dismantling, severance, etc., will have to be decided afresh.

The learned Government Pleader relied upon two rulings of single Judges, namely, of Satyanarayana Rao, J., in A.S. No. 552 of 1949 and Krishnaswami Nayudu, J., in A.S. No. 351 of 1949, dated respectively 14th February, 1951 and 7th August, 1952. No doubt in those cases, the notification under section 12 was in 1934 as here, and the acquisition was only in 1947, and the learned Judges took the view that the market value should be fixed only as on the date of the original notification in 1934 under section 12 of the Town Planning Act while pointing out the injustice to the claimants as the price had gone up by leaps and bounds. But the point now raised was not raised before them, namely, that the Government had no power to extend the period of the notification under section 12 and that if they must be deemed to have had such power by extending an indulgence, it could only by on the reasoning of Ramesam, Officiating Chief Justice, and the learned Judges in the Bench decision, namely, that they must be deemed to have issued fresh notifications under section 12 by those extensions, as they had an undoubted power to do, and to have used the extensions as a mere short-cut, but taking the full consequences of fresh notification including the liability to pay the market value as on the date of the last order of extension. In other words it is like the relief against forfeiture, granted as an indulgence by Courts in suitable cases under the Transfer of Property Act. Of course the Bench decision was much later than the decisions of the two learned single Judges. We may add that the decisions of the two learned single Judges were not brought to the notice of the learned Judges who decided the Bench case, though we do not think that the Bench decision would have been in any way different even if cited. Nor was even the observation of Ramesam, Officiating Chief Justice, brought to the notice of the two learned single Judges and the point discussed. We consider that the decisions of the single Judges might have been different in that case. We may also add that the Judge below did not discuss any of the above decisions relating to this point, but assumed as a matter of course and without even waiting for the Bench decision though requested to do so, that only the market value as on the date of the original notification under section 12 can be given.

We are, therefore, of opinion that the Bench decision holds the field, and we are bound by it, especially as we agree with the principle and reasoning therein. We see no point in the learned Government Pleader's attack on it as incorrect, and

see no reason to refer the matter to a Full Bench, as requested by the learned Government Pleader. We follow the decision of the Bench, which we hold to be the only possible correct view and we adopt the observations of Ramesam, Officiating Chief Justice and Cornish, J., and Rajagopala Ayyangar, J., in the above cases and hold that the extension of the section 12 notification by Government on 24th October, 1946, was not illegal or null and void but that the market value has to be paid as on the date of the last order of extension, namely, 24th October, 1946, in all these cases. To hold otherwise would be to hold the extensions themselves to be illegal and to make all the acquisitions sought to be covered by extensions to be null and void, too drastic and unthinkable a course for us to pursue in public interests, especially as the interests of private parties also do not require such an extreme step. They have interest only in being given the market value as on the date of last order of extension. It is obvious that even if the extensions are held to be illegal, that will not prevent the Government from issuing a fresh notification under section 12 and acquiring these lands under the Town Planning Act. In our opinion, the middle course followed by Ramesam, Officiating Chief Justice, and Rajagopala Ayyangar, J., and by the learned Judges who delivered the Bench judgments meets all the exigencies of justice, equity and good conscience, and should be adopted as just. The contention of the appellants to treat the acquisitions in these cases as acquisitions under the Land Acquisition Act is wholly untenable and is rejected.

It follows from all these that the judgment and decrees of the Court below must be set aside, and the reference in these Land Cases must be remanded to the Court below now the City Civil Court for being taken again on file and disposed of afresh after considering all relevant oral and documentary evidence let in by all the parties regarding the market value of these lands, damages, etc., as on 24th October, 1946, Of course all other questions of values and valuation and damages covered by the Land Cases will also stand remanded for fresh decision. In the circumstances, we direct all the parties to these appeals to bear their own costs, but direct the Court-fees paid on the appeal memos. to be refunded to the respective parties.

R.M. *Appeals allowed and references remanded.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE SUBRAHMANYAM.

K. Nataraja Pillai & Co., through one of its partners K. Nataraja Pillai .. *Petitioner**

Madras Buildings (Lease and Rent Control) Act (XXV of 1949), section 9—Change of name of institution-landlord after an order of eviction is made—Execution of the order under the old name—If can be continued.

An institution landlord which has obtained an order of eviction against its tenant, though it subsequently changes its name merely, can continue the old proceedings in execution under the old name itself.

Petition under section 115 of Act V of 1908, praying the High Court to revise the order of the District Court of Madurai, dated 21st October, 1957, and made in C.R.P. No. 460 of 1956, to revise the order of the Court of the District Munsif of Madurai Town in E.P. No. 81 of 1954 in H.B.P. No. 301 of 1951.

K. S. Ramamurthi and *T. R. Mani*, for Petitioner.

The Court delivered the following

JUDGMENT.—The Church of Sweden Mission Council in South India obtained an order for eviction against the petitioner. Learned counsel for the petitioner stated that the date of the order of eviction is 25th June, 1951. On 7th March, 1951, the general body of the Church of Sweden Mission Council in South India, at a special meeting, passed a resolution resolving to change the name of the Council into the "Church of Sweden Mission in India". The application for eviction had apparently been made before 7th March, 1951. The Council did not have

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* C.R.P. No. 1638 of 1957. 29th November, 1957.

its name changed into the new style when the order for eviction was made. Under the name as it stood before the change effected on the 7th March, 1951, the Council applied for execution of the order. The learned District Judge has held that the Council is entitled to maintain its application under its old name. I am unable to see any reason why it should not. This is not a case of transfer or devolution of interest but of a mere change of name. There is no reason why a person, who has changed his name during the pendency of proceedings in Court, should not continue the old proceedings under the old name, while adopting the new name for proceedings which would commence after the change in his name.

There is no substance in the Civil Revision Petition. It is dismissed.

R.M. *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. P. RAJAGOPALAN, *Officiating Chief Justice* AND MR. JUSTICE BASHEER AHMED SAYEED.

Muthuswami Gurukkal .. *Appellant**

v.

Ayyasami Thevan and others .. *Respondents.*

Madras Hindu Religious and Charitable Endowments Act (XIX of 1951), *section* 62 (1) *and Civil Procedure Code (V of* 1908), *Order* 39, *rules* 1 *and* 2—*Jurisdiction of civil Court to grant injunction in appropriate cases—If ousted in suits under section* 62 (1) *of Madras Act (XIX of* 1951).

In suits instituted under section 62 (1) of the Madras Hindu Religious and Charitable Endowments Act, it is not as if the Civil Court has no jurisdiction at all to grant any interim relief. What the section prohibits is only the stay of the order of the Commissioner. If the ordinary jurisdiction of the civil Courts are to be ousted by any special statute it must be by express words or necessary intendment of the statutory provision. The ban imposed by section 62 (1) of the Madras Hindu Religious and Charitable Endowments Act can be applied only to the extent warranted by the language of that statutory provision. The rest of the jurisdiction of the civil Court, *e.g.*, those regulated by rules 1 and 2 of Order 39, Civil Procedure Code, remain intact.

In a suit to set aside the order of the Commissioner and declare the plaintiff as hereditary trustee the Court can on the plaintiff's application grant an interim injunction restraining the newly appointed trustees from interfering with the plaintiff's possession of the temple lands. Such an injunction will not amount to stay of the operation of the order of the Commissioner within the meaning of section 62 (1) of the Madras Hindu Religious and Charitable Endowments Act. Whether or not an injunction should be granted is a matter for the Court to decide on the facts of each case applying the normal rules of law.

Nallamothu Chinpireyya, (1952) 2 M.L.J. 441, considered and distinguished.

Appeal under clause 15 of the Letters Patent against the Judgment and Order of the Hon'ble Justice Ramaswami, dated 24th September, 1957, and passed in A.A.O. No. 152 of 1957, preferred against the order of the Court of the Subordinate Judge of Coimbatore in I.A. No. 48 of 1957 in O.S. No. 267 of 1956.

V. S. Rangaswami Ayyangar, for Appellant.

S. Mohan Kumaramangalam, K. V. Sankaran and *S. Sethuratnam*, for Respondents.

The Judgment of the Court was delivered by

Rajagopalan, O.C.J.—These appeals by the plaintiffs arise out of interlocutory proceedings under Order 39, Civil Procedure Code, in two suits O.S. No. 264 of 1956 and O.S. No. 267 of 1956 instituted under section 62 of Madras Act XIX of 1951.

The Area Committee appointed defendants 1 to 5 as the trustees of the suit temples. That was how they were arrayed in both the suits. In O.S. No. 267 of 1956 the plaintiff and defendants 6 to 12 claimed that they were the hereditary trustees of the temples. In the other suit, O.S. No. 264 of 1956, the 3rd plaintiff, Narasimha Ayyangar, claimed he was the hereditary trustee along with two others. Those claims were negatived by the Deputy Commissioner of Hindu Religious and Charitable Endowments in proceedings under section 57 (*b*) of Act XIX of

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* L.P. Appeal Nos. 155 and 162 of 1957. 17th December, 1957.

1951, and that decision was upheld by the Commissioner. The plaintiffs filed the suits for which statutory provision was made in section 62 of the Act. The main reliefs asked for in O.S. No. 267 of 1956 were (1) to declare the plaintiff and defendants 6 to 12 as hereditary trustees of the temple and (2) to set aside the order of the Commissioner refusing to recognise the plaintiff and defendants 6 to 12 as hereditary trustees. The reliefs asked for in the other suit O.S. No. 264 of 1956 were in similar terms.

It should be noted that the plaintiff and defendants 6 to 12 in the suit referred to above claimed that they were also the hereditary archakas of the temples in question. There was no occasion to investigate that claim in proceedings under section 57 (*b*) of Act XIX of 1951 and referred to above. We shall proceed on the assumption that they were in fact archakas rendering service in the suit temples. A similar assumption will be made in the case of the 3rd plaintiff in O.S. No. 264 of 1956, Narasimha Ayyangar. It was common ground before us that the main, if not the only source of income of the temples, was the comparatively small extent of lands, about 6.83 acres wet lands, in L.P.A. No. 155 of 1957 and about a similar extent in L.P.A. No. 162 of 1957. Whether the temples owned only the melvaram or both the kudivaram and melvaram in the lands was not a question that arose for determination either in the proceedings under section 57 (*b*) or in the suits that were instituted. Here again we shall proceed on the assumption that the lands belonged to the temples.

After instituting the suits, each of the petitioners-appellants applied for an interim injunction to restrain defendants 1 to 5, the trustees appointed by the Area Committee, from interfering with the possession of the petitioner and his co-trustees pending disposal of the suit.

The applications were dismissed by the learned Subordinate Judge and Ramaswami, J., dismissed the appeals C.M.A. Nos. 152 and 155 of 1957 which the petitioners preferred. The appeals before us were presented under clause 15 of the Letters Patent against the decision of Ramaswami, J.

Two other features of the case have to be set out. Learned counsel for the appellants represented that the real relief that the plaintiffs wanted at this stage was that the plaintiff and defendants 6 to 12 in O.S. No. 267 of 1956 and the plaintiffs in the other suit should be left in possession and management of the lands till the disposal of the suits. It is from the produce of these lands that they who have been rendering archakam service in the temples as well, have to maintain themselves. There is no provision for a separate remuneration for the archakas, or for meeting the expenses of the puja. The other feature is that defendants 1 to 5 applied for the issue of a certificate under section 87 of Act XIX of 1951 to recover possession of these lands from the plaintiffs. That was granted with reference to the temples involved in L.P.A. No. 162 of 1957. The other application has yet to be disposed of.

Though the learned Subordinate Judge recorded that the question for determination was whether there were sufficient grounds to issue the injunction asked for, he refused that relief only on the ground, that the civil Court had no jurisdiction to grant it in a suit filed under section 62 of Act XIX of 1951. He was of the view that an earlier decision of Ramaswami, J., reported in *Nallamothu Chimpireyya, In re*[1], was authority for that position. The learned Subordinate Judge recorded:

"What is sought to be done by this petition is to stay the enforcement of the order of the Commissioner appointing respondents as trustees. That cannot be done, as civil Court has no right to stay the Commissioner's order pending disposal of the suit. My finding on this point, therefore, is that the petitioners are not entitled to get temporary injunction."

Ramaswami, J., was also apparently of the same view on the issue of jurisdiction. He stated:

"Therefore, when the civil Court cannot stay the order of the Commissioner pending the disposal of the suit it means that Courts cannot, for instance, injunct the lawfully appointed trustees from taking

1. (1952) 2 M.L.J. 441.

possession of the properties from persons who claim to be hereditary trustees and have not been found to be such and who till they are declared by the Court to be such would be in no better position than that of strangers and trespassers so far as these properties are concerned".

The learned Judge further held that even on grounds of *prima facie* case, irreparable injury or balance of convenience there was no justification for the grant of an interim injunction. Whether the requirements of Order 39, rule 1 (*b*) or those of Order 39, rule 2, were satisfied was a question, as we pointed out earlier, which the learned Subordinate Judge himself did not discuss or decide.

We have to decide first to what extent the jurisdiction vested in a civil Court regulated by the provisions of rules 1 and 2 of Order 39 was curtailed or taken away by the relevant portion of section 62 (1) which runs :

"but it (the Civil Court) shall have no power to stay the Commissioner's order pending the disposal of the suit."

Even at this stage we must record that Mr. Kumaramangalam refrained, and in our opinion very properly so, from contending that the civil Court had no jurisdiction at all to grant any interim relief in such circumstances as arise in this case, that is, in suits instituted under section 62 of the Act. If the relief is permissible under Order 39, rules 1 and 2 and if the interim relief asked for does not come within the mischief of section 62 (1), then the right and jurisdiction of the civil Court to grant such interim relief is not affected by section 62 (1). Learned counsel, however, urged that the appellants had not established any grounds in their applications for the grant of the discretionary reliefs.

In *Nallamothu Chimpireyya*, In re[1], one Verayya was appointed the trustee. He obtained the requisite certificate under section 87 of Act XIX of 1951 and in due course obtained an order from the Joint Magistrate for the delivery of the lands that belonged to the temples, which were in the possession of the petitioners in that case, the ex-trustees. The petitioners filed a suit under section 62, and in that suit they obtained an interim injunction to restrain Veerayya from taking possession of the lands. They subsequently applied to this Court to exercise its revisional powers under the Criminal Procedure Code and set aside the order of the Joint Magistrate who had ordered the delivery of possession of the lands to the trustee Veerayya. That relief was refused by Ramaswami, J. In the course of those criminal revision proceedings the learned Judge could not and did not go into the question, whether the interim injunction granted by the civil Court should be vacated or treated as *non est* in law. Apparently the learned Judge did not consider what the effect would be of leaving both the orders, intact, that of the criminal Court directing delivery of possession of the lands to Veerayya, and that of the civil Court prohibiting Veerayya from taking possession of those lands. We are not concerned now with the correctness or otherwise of the final decision of Ramaswami, J., in that case. What he observed at page 442 was :

"In fact section 62 of the new Act clearly lays down that an aggrieved party can file a suit; but the civil Court while vested with the jurisdiction to modify or cancel such order shall have no power to stay the Commissioner's order pending the disposal of the suit".

No exception can be taken to that passage. It was merely a re-statement of the law as embodied in the statutory provisions of section 62 (1). We are, however, still left with the question, what was it that section 62 (1) forbade the civil Court to do.

If the ordinary jurisdiction of the civil Court is to be ousted, it must be by the express words or by necessary intendment of the statutory provision on which reliance is placed. The ban imposed by section 62 (1) can be applied only to the extent warranted by the language of that statutory provision. The rest of the jurisdiction of the civil Court, that for instance regulated by rules 1 and 2 of Orders 39 will remain intact. It is neither desirable nor even possible to devise a formula of universal application to define the precise scope of the bar imposed by section 62 (1) of Act XIX of 1951. We can concern ourselves in these appeals only with the

1. (1952) 2 M.L.J. 441.

question whether the reliefs asked for by the plaintiffs-appellants fell within the mischief of the statutory ban imposed by section 62 (1).

The relief asked for before the Deputy Commissioner was a declaratory one, that the plaintiff and defendants 6 to 12 in one case and the 3rd plaintiff and his fellow archakas in the other were, the hereditary trustees of the temples in question. That relief was refused. The suits were to establish that right and to set aside the order of the Deputy Commissioner as confirmed by the Commissioner. There was nothing in the operation of that order as such to be stayed pending disposal of the suits. Nor was the stay of the operation of those orders as such asked for by the plaintiffs in express terms. What the appellants now seek is that their possession of the temple lands should not be interfered with by the trustees, defendants 1 to 5 till the disposal of the suits. The grant of such a relief will not amount to stay of the operation of the Commissioner's order till the disposal of the suits, within the meaning of section 62 (1). There was no direction of the Deputy Commissioner in his order which related to the lands or of any of the other properties of the temples. There could not have been such a direction in proceedings under section 57 (*b*) of the Act. The order of the Deputy Commissioner would be left intact even if the restricted interim relief now asked for by the appellants is granted. Ramaswami, J., it should be remembered observed, in his judgments which have been appealed against :—

> "Therefore when the civil Court cannot stay the order of the Commissioner pending the disposal of the suit it means that Courts cannot, for instance, injunct the lawfully appointed trustees from taking possession of the properties from persons who claim to be hereditary trustees."

With all respect to the learned Judge, we are unable to accept that as a correct statement of the scope of section 62 (1) of Act XIX of 1951. The Civil Court has jurisdiction in the circumstances of this case to grant the interim relief asked for by the plaintiffs. Whether in the exercise of its discretion, the Court should grant that relief is, however, a wholly different problem.

As we pointed out earlier, the learned Subordinate Judge did not have any occasion to go into the question, whether in the exercise of the jurisdiction that he had he should grant the interim relief asked for, that is, he had no occasion to decide and he did not decide whether the requirements of Order 39, rule 1 or rule 2 had been satisfied by the petitioners. At one stage we thought, if the parties could come to an agreement before us, we could dispose of these interlocutory proceedings by a final order. That, however, has not been possible. The material on record is not sufficient either for us to come to a decision one way or the other on the question whether in the circumstances disclosed in the affidavits of the petitioners-plaintiffs they made out any case at all for the grant of any interim relief. No doubt the interim relief originally asked for was couched in very wide terms. But as we pointed out earlier, at this stage before us the relief was confined to the question, whether the appellants who claimed to be the hereditary trustees and who are certainly the archakas of the temples, should be dispossessed of the lands. Mr. Kumaramangalam, learned counsel for the respondents, represented to us that the lands themselves would appear to have been leased out and that tenants were in possession. Even that does not appear from the records before us. In these circumstances we think the only appropriate course is to set aside the orders of the learned Subordinate Judge and the orders of Ramaswami, J., who confirmed those orders and to remand the proceedings for disposal afresh by the learned Subordinate Judge. We pointed out that the material on record was not sufficient for us to come to any conclusion. This is a case where we think the parties should be given a further opportunity by the learned Subordinate Judge to supplement their affidavits and, if necessary, to place the available material on record for the learned Judge to decide whether in the circumstances so established the petitioners should he granted any interim relief. Nothing we have said in this judgment should be construed as in any way curtailing the exercise of the discretion of the learned Subordinate Judge. We have dealt with only the question of jurisdiction. If the requirements of Order 39, rules 1 and 2 are satisfied, in the circumstances of this case, section 62 (1) does not operate as a bar for the grant of the relief permissible under those statutory pro-

visions. We have already pointed out that it was in very wide terms that the petitioners-appellants asked for interim relief. The learned Judge in disposing of the applications afresh in the light of this judgment will keep in mind that the question for determination before him will be confined to the lands.

The appeals are allowed. Costs in the proceedings in all the Courts will be costs in the cause and will be provided for in the revised order to be passed by the learned Subordinate Judge.

R.M. — *Appeals allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE RAMASWAMI.

Marappa Goundar .. *Petitioner*.*

Limitation Act (IX of 1908), section 18—Scope—Extension of period of limitation in case of fraud—Application to set aside sale in execution—Order 21, rule 90, Civil Procedure Code (V of 1908).

Section 18 of the Limitation Act is an enabling provision which postpones the starting point of limitation in cases where the right to seek relief is kept from knowledge by means of fraud.

To invoke the aid of this section it must be established that there had been a fraud, that by means of such fraud one was kept from the knowledge of his right to sue or apply or of the title on which such right is founded and time will be extended under this section only as against the person guilty of fraud, or who is accessory thereto or who claims through the person guilty of fraud otherwise than in good faith and for valuable consideration.

A judgment-debtor seeking to have a sale in execution set aside can invoke the aid of this section where the fraud is proved to have been committed by the decree-holder or the auction-purchaser or both, and as both the auction-purchaser and the decree-holder are necessary parties to an application under Order 21, rule 90, Civil Procedure Code, for setting aside a sale, the fraud of one or the other would be sufficient to have the sale set aside.

Petition under section 115 of Act V of 1908 praying the High Court to revise the order of the Court of the Principal District Munsif, Coimbatore, dated 25th February, 1957 and made in E.A. No. 1247 of 1956 in E.P. No. 77 of 1956 in O.S. No. 793 of 1952.

S. Mohan Kumaramangalam and *S. Sethuratnam*, for Petitioner.

The Court delivered the following

JUDGMENT.—This is a revision sought to be preferred against the order by the learned District Munsif of Coimbatore in E.A. No. 1247 of 1956 in E.P. No. 77 of 1956 in O.S. No. 793 of 1952.

The decree-holder Marakkal (first respondent in the lower Court) obtained a decree against the petitioner Marappa Gounder. In pursuance of that decree the decree-holder took out execution proceedings and brought the properties of the petitioner to sale subject to a mortgage. The sale was held on 9th July, 1956 and the successful auction-purchaser is Rangaswami Gounder (second respondent in the lower Court). Then the petitioner filed an application to set aside the sale beyond 30 days accompanied by an application to excuse delay under section 18 of the Limitation Act. In order to attract the provisions of section 18, the petitioner contended that there was a panchayat at the instance of some mediators between himself, the decree-holder and the mortgagee Valliakkal and others. In that panchayat it is stated that it was agreed that Sellappa Gounder, the sammandhi of the petitioner should purchase the properties sold for Rs. 10,000. Sellappa Gounder wanted three months' time to enable him to get the necessary funds for the purchase. The first respondent decree-holder is stated to have agreed to receive the amount out of Court three months later after the sale to Sellappa Gounder. The decree-holder is said to have agreed to this course because she would get the entire decree amount without waiting till 1958, July, for recovery of the amount as per Act I of 1955. The mortgagee Valliakkal it is further stated agreed that her mortgage may be subjected in the sale deed. On account of this arrangement it is finally stated that the decree-holder agreed to receive the amount in the village itself and she promised that she will not proceed with the sale of the properties and the petitioner need not go to

*C.R.P. No. 719 of 1957. 2nd July, 1957.

Coimbatore in connection with the sale and that therefore acting upon this representation the petitioner kept quiet and subsequently learnt that the mortgagee Valliakkal's son, the second respondent, had purchased the property in Court auction. Therefore, the petitioner came to Court with an application after excusing delay to set aside the sale.

The two points which arose for consideration before the lower Court were whether the panchayat set up by the petitioner is at all true: and secondly whether the petitioner can rely upon the said panchayat to attract the provisions of section 18 of the Limitation Act in view of the admitted fact that the petitioner was aware that 9th July, 1956, had been fixed as the date of sale.

On both these points the lower Court held against the petitioner, *viz*., that the alleged panchayat is not true and that section 18 of the Limitation Act would not be attracted. I agree with the lower Court in regard to its conclusions on both these points and consider that its decision rejecting the application is irreproachable. Here are my reasons:

Point 1.—First of all, as pointed out by the learned District Munsif, there is nothing in writing to show that there was any panchayat and that any settlement was arrived at and that the parties agreed to abide by it. Secondly, the alleged Panchayatdars apart from the petitioner and P.W. 6 belong to the Panapatti village where the petitioner resides and they all belong to the same community, whereas the decree-holder belongs to the village of Vadachittut and she is long past the Biblical three-score and ten and is old and infirm and she was examined out of turn by her counsel on the ground that it would be difficult to bring her to Court house on the next hearing date. Concerning her, the learned District Munsif writes:

> "I have observed her and she was quite infirm and it is too much to think that this old woman who could hardly sit firm on the chair provided for her would walk or go by cart to a distance of three miles for this wonderful panchayat."

In other words, the learned District Munsif found that this old woman would not have gone to the panchayat at all as alleged and that the witnesses who speak to this alleged panchayat are all partisans of this judgment-debtor, and that if the version were really true one would expect better or more distinterested testimony or something in writing to support this account of the judgment-debtor. The learned District Munsif writes:

> "P.W. 1 has pressed into service his friends in the village who belong to his own community and who had no connection whatsoever with the 1st respondent to put forward this unnatural panchayat. Before the Court can accept this version of panchayat it has to first hold that P.W. 1 is such a gullible person who is prepared to swallow any promise that is made and who can be led through his nose by the respondents".

The learned District Munsif further states:

> "After observing him in the box I can certainly say that P.W. 1 is a man of the world who knows what is what and who knows the consequences of his act. So I have no hesitation in rejecting the entire case of the alleged panchayat set up by the petitioner. Nothing like the panchayat took place".

The subsequent conduct of the petitioner also corroborates this conclusion. He knew that the sale had been fixed to take place on 9th July, 1956. The other steps had already been completed and all that the decree-holder had to do after 11th June, 1956, when the respondent's counsel had objected to the adjournment of the sale, was to pay the sale batta. The property is said to be worth Rs. 10,000 and the judgment-debtor is said to have been determined to see that the property was retained within the family fold by an arrangement with his sammandhi. But the judgment-debtor agrees that he neither went to the Court on 9th July, 1956, to make sure that the decree-holder from whom he heard nothing later and who was living in a different village and from whom he had nothing in writing kept up her alleged promise nor even for a period of two months, thereafter. The learned District Munsif pertinently points out that that it is not possible to believe this P.W. 1 when he states that he was so totally oblivious after this alleged panchayat in the first week of Ani. Therefore, looked at from any point of view this alleged panchayat has been evolved in order to make out a plausible case for attracting the provisions of section 18 of the Limitation Act. Point 1 was rightly found against the petitioner.

Point 2.—Section 18 of the Limitation Act is an enabling section which postpones the starting point of limitation for suits and applications like applications to set aside execution sales where the plaintiff's or the applicant's right to seek relief is kept from this knowledge by means of fraud. The mere fact that the cause of action is founded on fraud is not enough to bring the case within this section. Article 95 will apply to such cases.

Whether section 18 or Article 95 applies, time, however, runs from the date when the fraud first becomes known to the person injuriously affected by the fraud and the right of the party defrauded is not affected by lapse of time so long as he remains in ignorance of the fraud.

A person desiring to invoke the aid of this section must establish three things, *viz*.,

(1) that there has been fraud;

(2) that by means of such fraud he was kept from the knowledge of his right to sue or apply or of the title on which such right it founded; and

(3) time will be extended under the section only as against the person guilty of fraud, or who is accessory thereto or who claims through the person guilty of fraud otherwise than in good faith and for valuable consideration.

These three conditions must concur in proceedings to set aside execution sales on the grounds set out in section 18 of the Limitation Act. It is not enough for instance for the plaintiff or the applicant to show that the action by the defendant or respondent was fraudulent.

What is fraud? Upendra Nath Mitra's "Law of Limitation and Prescription" (M.L.J. Publication), 7th Edition, Vol. I, page 188, has the following to say;

"Fraud affects limitation only where it prevents a person from knowing of his right or the title on which the right is founded; it means active deceit in defrauding or endeavouring to defraud a person of his rights by artful device, that is, designed fraud by which a party knowing to whom the right belongs conceals the circumstances giving that right, *i.e.*, the title to the right to sue. To constitute fraud there should be an abuse of confidential position, some intentional imposition, some deliberate concealment of facts, a designed fraud by which a party knowing to whom the right belongs conceals the facts and circumstances giving that right. The knowledge required by the section is not mere suspicion, but full knowledge of such a character as will enable the person defrauded to seek his remedy in Court. The right of the party defrauded is not affected by lapse of time or generally speaking, by anything done or omitted to be done, so long as he remains without any fault of his own in ignorance of the fraud which has been committed."

It has been further pointed out in the A.I.R. Commentaries on the Limitation Act (3rd Edition), Vol. I, page 561:

The fraud contemplated by this section is not confined to fraud committed at the inception of the cause of action, but may include fraud committed even before that date. Thus, where fraud is committed by the decree-holder in execution proceedings taken for bringing the property of the judgment-debtor to sale, this section would apply to an application by the judgment-debtor to set aside the sale on the ground of fraud, though the right to apply only arises on the date of the sale and though no fresh act of fraud is proved at the date of the sale. The reason is that the fraud committed in the execution proceedings would have a cotinuing influence and would retain its power of mischief until that influence ends. If at the date of the cause of action the effect of the antecedent fraud continued so as to keep the person injured from knowledge of his right to seek relief, this section would clearly apply . . . .".

The proof of fraud required has been summarised in Rustomji's Law of Limitation (5th Edition), Vol. I, page 283, as follows:—

"The onus is on the person seeking the protection of section 18 to prove the fraud. Moreover, by reason of Order 7, rule 6, Civil Procedure Code, an exemption on the ground of fraud must be claimed in the plaint. Fraud must be proved and cannot be inferred, and the Court must not presume its existence from certain suspicious circumstances. Charges of fraud and collusion must, no doubt, be proved by those who make them. . . . . proved by established facts or inferences legitimately drawn from those facts taken together as a whole. Suspicions and surmises and conjecture are not permissible substitutes for those facts or those inferences but that by no means requires that every puzzling artifice or contrivance resorted to by an accused of fraud must necessarily be completely unravelled and cleared up and made plain before a verdict can be properly found against him. If this were not so, many a clever and dexterous knave would escape. The party who alleges fraud must do so clearly and specifically and with detailed particulars. General allegations of fraud will not be permitted. Fraud ought not to be lightly imputed to the living; for the legal presumption

is the other way; and as to the dead, who are not here to answer for themselves, it would be the height of injustice and cruelty to disturb their ashes, and violate the sanctity of the grave, unless the evidence of fraud is clear, beyond a reasonable doubt".

I have already pointed out that time will be extended under section 18 only as against the person guilty of fraud, or who is accessory thereto or who claims through the person guilty of fraud otherwise than in good faith and for valuable consideration. It seems to be clear, therefore, that where an execution sale is brought about by the fraud of the decree-holder, and the property is purchased by a third person in good faith and for valuable consideration, the period, prescribed for an application to set aside the sale on the ground of fraud cannot be extended as against the auction-purchaser, though, if an application is filed within the prescribed period, it is not necessary in order to set aside the sale under the provisions of Order 21, rule 90, of the Code of Civil Procedure that the purchaser should also be guilty of fraud. A contrary view has been expressed in *Sailendra Nath* v. *Sudhanya Charan*[1], that it is not necessary for the applicability of this section that the purchaser should also be guilty of fraud. Where the decree-holder is not guilty of fraud, but the auction-purchaser is, does the section apply so as to extend the time for an application against either to set aside the sale? There is a difference of opinion on this point. It was held in *Azizunnessa* v. *Dwarka Prosad*[2], that it will not apply, while a contrary view has been held in *P. Venkanna* v. *C. Venkanna*[3], and *Pulla Reddi* v. *Pattabhirama Reddi*[4].

This conflict of opinion has been settled by a Bench decision of this Court in *Karupanna Gounder* v. *Ponnuthayee*[5], where it has been held as follows:

"A judgment-debtor, who is kept out of the knowledge of the execution sale by fraud, can, in an application under Order 21, rule 90, Civil Procedure Code, to set aside the sale, invoke the aid of section 18 of the Limitation Act, to extend the period of limitation where the fraud is proved to have been committed by the decree-holder or the auction-purchaser or both. It is true that fraud as contemplated under section 18 of the Limitation Act, must be fraud of the person against whom the suit or application is made and as both the auction-purchaser and the decree-holder are necessary parties to an application under Order 21, rule 90, Civil Procedure Code, for setting aside a sale, the fraud of one or the other would be sufficient to have the sale set aside."

In this connection it is interesting to note that in the A.I.R. Commentaries on the Limitation Act, the view expressed in this Bench decision is submitted to be the correct view (Vol. I, page 568).

Bearing these principles in mind if we examine the facts of this case, we find that the provisions of section 18 of the Limitation Act are not attracted.

This revision is dismissed.

V.S. ——— *Revision dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. P. RAJAGOPALAN, *Officiating Chief Justice* AND MR. JUSTICE BASHEER AHMED SAYEED.

S. R. Narayana Ayyar .. *Petitioner**

v.

Mavalathara Veerankutti and others .. *Respondents.*

Court-Fees Act (VII of 1870) (as amended in Madras), section 6 and Madras City Civil Courts Act (VII of 1892) as amended by section 8 (1) of Madras Act (X of 1955)—Transfer of suits from the Original Side of the Madras High Court to the City Civil Court—Levy of additional Court fee on such transferred suits—Whether can be made.

Since the suits had been transferred from the Original Side of the High Court to the City Civil Court under the statutory provision contained in section 8 (1) of Madras City Civil Court Amendment Act (X of 1955), which vests no discretion or option in the High Court to make a transfer or not after Act (X of 1955) came into force, section 16 of Madras City Civil Court Act (VII of 1892) would not be applicable to the present transfers and hence no additional Court-fee under proviso 3 to section 16 can be levied.

1. A.I.R. 1950 Cal. 166.
2. A.I.R. 1925 Cal. 1227.
3. (1950) 1 M.L.J. 471 : A.I.R. 1950 Mad. 509.
4. (1933) 65 M.L.J. 139 : I.L.R. 56 Mad. 734.
5. (1955) 2 M.L.J. (N.R.C.) 62. [Fully reported in (1956) 1 M.L.J. 190 : I.L.R. (1956) Mad. 927 : A.I.R. 1956 Mad. 198].

* C.R.P. Nos. 77, 113 and 114 of 1956. 17th December, 1957.

A transfer of suits from the Original Side to the City Civil Court under section 8 of Madras Act (X of 1955) could not be brought within the scope of the word ' received ' occurring in section 6 of Court-fees Act (VII of 1870).

In the absence of any specific provision for such a levy in consequence of transfer of suits under section 8 of Madras Act (X of 1955) no additional Court-fee can be levied.

Official Assignee, Madras v. *Ranganathan*, (1951) 2 M.L.J. 93, referred.

Petitions under section 115 of Act V of 1908 praying the High Court to revise the orders of the Principal Judge, City Civil Court, Madras, dated 20th October, 1955 and made in C.S. No. 224 of 1950, C.S. No. 353 of 1947 and C.S. No. 272 of 1950 respectively.

G. N. Chari, R. Srinivasan, B. V. Viswanatha Ayyar, Alladi Subramaniam and *Alladi Kuppuswami*, for Petitioner.

The Additional Government Pleader (*K. Veeraswami*), for Respondents.

The Judgment of the Court was delivered by

Basheer Ahmed Sayeed, J.—These three Civil Revision Petitions arise out of a common order passed by the learned Principal Judge, City Civil Court, in C. S. Nos. 224 of 1950, 353 of 1947 and 272 of 1950 and some other suits transferred for disposal to the file of the City Civil Court from the Original Side of the High Court.

The Madras City Civil Court Act (VII of 1892) was amended by Madras Act X of 1955. The main purpose of this Amending Act was to enhance the pecuniary jurisdiction of the City Civil Court from Rs. 10,000 up to Rs. 50,000. In consequence, section 8 of Madras Act X of 1955 enacted a transitory provision in the following terms :

"*Transitory provision* (1).—All suits pending in the High Court on the date of the commencement of this Act and which would be within the cognizance of the Madras City Civil Court under the provisions of this Act shall stand transferred to the Madras City Civil Court".

By a further amending Act, Madras Act XXIX of 1955, this transitory provision was amended to read as follows :

"All suits pending in the High Court on the date of the commencement of this Act and which would be within the cognizance of the Madras City Civil Court under the provisions of the said Act as amended by this Act shall stand transferred to the Madras City Civil Court."

Clause (2) of section 8 is not relevant for the purpose of these petitions. By virtue of this transitory provision a number of suits (13 in number) referred to in the common order, from which these Civil Revision Petitions have arisen, were transferred from the Original Side of the Madras High Court to the City Civil Court. After such transfer, a question arose as to whether additional Court-fee should be paid on the suits so transferred and which were pending trial before that Court. Notices were ordered to the parties and the present petitioners filed their objections. After hearing the parties and the Government Pleader, the learned Principal City Civil Judge passed the order under revision holding that the plaintiffs should pay additional Court-fee as per law and gave them time for paying the additional Court-fee. In doing so, the learned Principal City Civil Judge based his decision on the rulings contained in *Ragunath Ganesh* v. *Vaman Vasudeo*,[1], *Official Assignee, Madras* v. *Ranganathan*[2], and *Ramamirtham* v. *Rama Film Service*[3].

Mr. G. N. Chari, learned counsel for the petitioners, before us, contended in the first instance that under section 87 (2) of Act XIV of 1955 that is the newly enacted Court-Fees and Suits Valuation Act, additional Court-fee could be claimed only if the suits had been instituted in the City Civil Court, where they are to be tried, before the commencement of Act XIV of 1955, and that these suits having been instituted on the Original Side of the High Court and subsequently transferred to the City Civil Court the saving clause (2) of section 87 will not apply. We do not think that there is any force in this contention of the learned counsel for it has to be noted that when the suits in question were originally instituted in the High Court on its Original Side, the fee payable was regulated not by the Court-Fees Act and Suits Valuation Act but by the Fees Rules framed by the High Court for the institution of suits on the

1. A.I.R. 1950 Bom. 234.
2. (1951) 2 M.L.J. 93.
3. (1951) 2 M.L.J. 121.

Original Side. The fee prescribed by the said Original Side Rules had been paid on these suits, when they were instituted, and consequently the suits must be considered to have been properly instituted so far as the High Court was concerned. Since the Court-Fees Act does not govern the institution of suits on the Original Side of the High Court, the argument based on section 87 (2) cannot be considered to be relevant to the point that arises for consideration in these petitions.

These are suits which have been properly instituted on the Original Side but have later been transferred to the City Civil Court for trial, and the transfer has been under section 8 of Madras Act, X of 1955. But the learned Government Pleader urged that section 16, proviso (3) of Central Act, VII of 1892, would govern the present case. If that contention is to prevail, we have to see whether the transfer of these suits has taken place under the powers exercised by the High Court under proviso (2) to section 16 of Act VII of 1892. Section 16, proviso (2), is in the following terms:

"Nothing in this Act contained shall affect the Original Civil Jurisdiction of the High Court provided that (1) .... (2) in any suit or other proceeding pending at any time in the High Court, any Judge of such Court may, at any stage thereof make an order transferring the same to the Civil Court if in his opinion such suit or proceeding is within the jurisdiction of that Court and should be tried therein".

If an order is made under this proviso, then the 3rd proviso to section 16 would come into operation. Section 16, proviso (3), is to the effect that

"Provided that (3) in any suit or other proceeding so transferred the Court-Fees Act, 1870, shall apply credit being given for any fees levied in the High Court."

It is to be observed that a specific provision has been made for the recovery of additional Court-fees in case a transfer is effected by an order of the Judge of the High Court under section 16, proviso (2). As already stated the present suits have not been trasferred by any order of the High Court exercising the power provided in section 16, proviso (2) of Act VII of 1892, in which case alone proviso (3) to section 16 will come into operation. In the present case the suits in question have been transferred by virtue of section 8 of Act X of 1955, which vests no discretion or option in any Judge of the High Court to make a transfer or not after Act X of 1955 has come into force. On the other hand the statutory provision contained in section 8 of the said Act X of 1955 effects an automatic transfer of all suits pending before the High Court which come within the purview of the said Act X of 1955.

In this connection reliance has been placed by the learned Government Pleader upon the decision reported in *Official Assignee, Madras* v. *Ranganathan*[1], wherein Raghava Rao, J., on the facts of that case held that in respect of a plaint transferred from the Original Side of the High Court to the City Civil Court the Additional Court-fee could be called for. In that case, a plaint had been transferred from the Original Side of the High Court to the Madras City Civil Court under section 16, proviso (2) of the Madras City Civil Court. That being so, proviso (3) to section 16 of the City Civil Court Act which provides that the Court Fees Act shall apply to such plaints, credit being given for any fees levied in the High Court came into operation *ipso facto* and therefore he held that the City Civil Court was entitled to collect the balance of the Court-fee payable after giving credit for the fee already paid, and repelled the agrument that there were no charging provisions in that Act enabling the levy of additional Court-fee. This decision, in our opinion, has no application to the facts of the present case.

The learned Government Pleader, next relied upon the decision reported in *Raghunath Ganesh* v. *Vaman Vasudeo*[2], In that decision Shah, J., held, that when a plaint in a suit filed on the Original Side of the High Court was transferred to the file of a Civil Judge, Senior Division, on application of the defendant, it was governed by section 6 of the Court Fees Act of 1870, and the plaintiff was liable to pay additional Court-fee on the plaint even though it was sufficiently stamped, when filed before the High Court. He also observed that the fact that the plaint was transferred not

1. (1951) 2 M.L.J. 93. 2. A.I.R. 1950 Bom. 234.

by reason of a voluntary act on the part of the plaintiff but in pursuance of an order of the Court was not relevant in considering the application of section 6 and that it could not also be asid that in such a case the act of Court was causing prejudice to a party as the transfer had been ordered for reasons of convenience and the order involved consequences including a statutory liability to pay Court-fees. The learned Judge further observed that the circumstance that the plaint was lodged in another Court, which according to the provisions governing it treated it as properly instituted, could not prevent the application of section 6, Court Fees Act and that the Court-fee payable on a document had to be ascertained under the provisions of the Court Fees Act, at the time when the document was required to be filed, exhibited or received in a Court and that if the document was not adequately stamped at the crucial date, it had no validity. The learned Judge also distinguished the decisions in *Bibee Golap Kumari* v. *Muhammad Kadiruddin*[1]. We have considered the facts of the case decided by Shah, J., in *Ragunath Ganesh* v. *Vaman Vasudeo*[2], and we think that the principle underlying this decision is one which could easily fall within the scope of section 16, proviso (3) of Madras Act VII of 1892, for it is seen that, in that case, the High Court exercised power vested in it to transfer at any stage a suit from the Original Side to a Civil Judge, Senior Division. Such transfer may be either *suo motu* or on the application of the plaintiff or of the defendant as under section 24, Civil Procedure Code. In *Official Assignee, Madras* v. *Ranganathan*[3], Raghava Rao, J., however doubted the correctness of the decision of Shah, J., in *Raghunath Ganesh* v. *Vaman Vasudeo*[2], at page 95 the following observations of Raghava Rao, J., seem to be relevant :

"It may be that as argued by Mr. Viswanatha Ayyar the ruling of a single Judge of the Bombay High Court reported in *Raghunath Ganesh* v. *Vaman Vasudeo*[2], which is relied upon by the learned Government Pleader before me is not correct in so far as it seeks to justify the levy of further Court-fee with reference to section 6 of the Court Fees Act. I am rather inclined to agree with Mr. Viswanatha Ayyar that the learned Judge of the Bombay High Court has not correctly interpreted the words of section 6 in holding that they have application to cases of transferred plaints. The learned Judge observes :

"The fact that it is not by reason of a voluntary act on the part of the plaintiff that the plaint was transferred but in pursuance of an order of the Court that the plaint was transferred is also not relevant in considering the application of section 6".

That, perhaps, is to subject to an undue strain the language of section 6 which has reference only to documents received, filed or used in any Court or office without being stamped unless the word 'received' is to be understood as wide enough to cover plaints received by transfer. Whatever that may be, I feel clear that the language of section 16, proviso (3) is itself sufficient to imply with reasonable clearness the intention of that Legislature that after the transfer of the plaint from the Original Side of the High Court effect must be given to the provisions of the Court Fees Act which would have applied had the plaint been filed in the first instance itself in the City Civil Court due credit of course being given to the fees already levied in the High Court".

We are ourselves inclined to agree with these observations of Raghava Rao, J. We do not think that the Legislature which enacted section 6 of the Court Fees Act of 1870 could have intended to give to the term "receive" used therein such a wide meaning as Shah, J., of Bombay High Court has sought to give it.

In *Tara Chand* v. *Radhakrishna Sugar Mills*[4], to which our attention has been drawn by the learned Government Pleader a converse case came up for consideration before Mukherji, J. The question that arose in that case related to the jurisdiction of the High Court of Calcutta to grant a certificate for refund of Court-fee when a suit was transferred to the High Court under its Extraordinary Original Civil Jurisdiction under clause 13 of the Letters Patent. The learned Judge held that the High Court had no statutory or inherent jurisdiction to make any order either for refund of Court-fees or for the issue of a certificate for such refund in the case of a suit transferred to the High Court in its Extraordinary Original Civil Jurisdiction under clause 13 of the Letters Patent. The case-law on the point has also been discussed elaborately in the said judgment. Sections 3 and 4 of the Court Fees Act (VII of 1870) also come up for consideration. In paragraph 19 of the Judgment at page 56 the learned Judge, interpreting the scope of section 4 of Act VII of 1870 (Court Fees Act) has observed as follows :

1. (1907) 12 C.W.N. 917.
2. A.I.R. 1950 Bom. 234.
3. (1951) 2 M.L.J. 93.
4. A.I.R. 1955 Cal. 52.

"To create an artificial excess by calculation with reference to the fees in the High Court and to grant a certificate for refund of such artificially conceived excess will be to act in derogation of the Statute".

The learned Judge, however, observed further in the following terms :

"Here the Legislature has made a special statutory provision for fees on documents in the High Court in its Extraordinary Original Civil Jurisdiction and yet it has not chosen to provide for the refund of fees in case of such transfer. The interpretation therefore appears to be that this section 4, Court Fees Act, by necessary implication excludes any question of refund of Court-fees in case of transfer of suits to this High Court in its Extraordinary Original Civil Jurisdiction. The learned Standing Counsel argued that section 4 of the Act could be interpreted to confine the application of that section to documents filed in the High Court although the word used is 'received'. But even then the necessary implication of the section is irresistible that the Legislature did not provide for return of any Court-fee in such cases".

Though that case has no direct bearing on the point that arises for consideration in the present petitions, still the point to be noted in this decision is that, the statute makes no provision for the refund of any excess Court-fee that could be found to have been paid on a calculation with reference to fees payable in the High Court on a transfer of the suit ordered by the High Court. It could not have been the intention of the Legislature that additional Court-fee should be paid by the party when a transfer is effected not by an order of the High Court but by the operation of a provision in the statute itself, when no specific provison is made to that effect in the Act which enhanced the jurisdiction of the City Civil Court.,

Our attention has also been drawn to a Full Bench decision in *Ramamirtham* v. *Rama Film Service*[1]; the main questions that came up for consideration in that decision were the applicability of section 15 of the Code of Civil Procedure to the High Court exercising Ordinary Original Jurisdiction when there was a conflict between the Original Jurisdiction of the High Court and the City Civil Court constituted under the Madras City Civil Court Act, and the validity of the power conferred by section 3-A of the Madras City Civil Court Act on the Provincial Government to fix by a notification the pecuniary jurisdiction of the City Civil Court, and also the jurisdiction of the High Court to transfer suits in relation to provisos (1) and (2) of section 16 of Act VII of 1892 and section 24 of the Code of Civil Procedure. The question as to the validity of the claim for additional Court-fee on the transfer of suits form the High Court to the City Civil Court did not directly arise in that decision. A perusal of the entire judgment shows that that decision is no authority on the question as to whether the parties were bound to pay additional Court-fee when suits were transferred under a statutory provision from the Original Side of a High Court to the City Civil Court.

If the transfer of the suit from the Original Side of the High Court to the City Civil Court is not effected under the 1st or the 2nd proviso to section 16 of Act VII of 1892 and if the 3rd proviso to that section does not apply to the transfer in question then the only other section under which a claim for additional Court-fee could be made is section 6 of Court Fees Act of 1870. A close scrutiny of the terms of this section does not convince us that a transfer of suits from the Original Side of the High Court to the City Civil Court under section 8 of Act X of 1955 could be brought within the scope of the word 'received' occuring in that section. No doubt, when a transfer is made from one Court to another, there is the receiving Court, and there is also the Court that sends the plaint or the suit records to the other Court; but the question is whether the term 'received' used in this section could be strained to such an extent as to include within its meaning plaints and suit records that are automatically and statutorily transferred from one Court to another without the intervention of any act on the part of any Court or the parties concerned. We doubt whether such a situation could have been contemplated by the Legislature. If it was, however, the intention of the Legislature when it enacted Act X of 1955 that on such statutory transfer also additional Court-fee should be levied, then nothing could have prevented the Legislature to provide for such levy of additional Court-fee when a statutory transfer of suits was being effected, it being remembered such a provision was actually enacted,

1. (1951) 2 M.L.J. 121 (F.B.).

under proviso (3) to section 16 of Act VII of 1892. When the Legislature did not choose to provide for such a levy of additional Court-fee, when such a provision was omitted to be made and when it is not possible to enlarge the scope of the word 'received', used in section 6 of the Court-fees Act of 1870, the application of which is saved by section 87 (2) of Act XIV of 1955, and when the levy of additional Court fee is a fiscal act, the benefit of the lack of a provision for the levy of such a fee, cannot be claimed by the State. Obviously the benefit must go to the party in the absence of any specific provision for such a levy in consequence of the transfers of suits effected under the operation of section 8 of the Act X of 1955.

In our opinion, therefore, the order of the learned City Civil Judge directing the levy of additional Court-fee on the plaints is not sustainable. The order is therefore set aside and the trial of the suits will be proceeded with according to law. In the circumstances there will be no orders as to costs.

V.S. —— *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. P. RAJAGOPALAN, *Officiating Chief Justice* AND MR. JUSTICE RAJAGOPALA AYYANGAR.

T.M.K. Abdul Kassim, Madurai, one of the legal representatives of T. M. Kadhir Mohideen (deceased) .. *Petitioner**

v.

The First Additional Income Tax Officer, Karaikudi and another .. *Respondents.*

Income-Tax Act (XI of 1922), section 46 (2)—Scope of—Recovery of arrears of tax by issue of certificate to the Collector—If applicable to cases of recovery from legal representatives of an assessee.

In order to attract the provisions of section 46 (2) of the Income-tax Act relating to recovery of tax due from an assessee through the Collector as an arrear of land revenue, two conditions must be satisfied, namely, (1) the amount must be in arrears and (2) the arrears must be due from an assessee. The recovery of the arrears under section 46 (2) of the Act is limited by the same considerations which would decide whether an assessee is in default within the meaning of section 46 (1) of the Act. A legal representative of a deceased assessee, it has been held, is not himself an assessee within the meaning of section 46 (1) of the Act and as such he cannot also be an assessee under section 46 (2). His liability to pay any tax due by the deceased assessee is limited by the possession of assets of the deceased. Hence the Income-tax Officer has no jurisdiction to issue a certificate under section 46 (2) of the Act for recovery of the tax from the legal representative treating him as the assessee.

Rajah Manyam Meenakshamma v. *Commissioner of Income-tax*, (1956) An. W.R. 645 and *Alfred* v. *Additional Income-tax Officer*, (1956) 2 M.L.J. 149, referred to.

Petition under Article 226 of the Constitution of India, praying that in the circumstances stated therein, and in the affidavit filed therewith the High Court will be pleased to issue a writ of prohibition or any other appropriate writ prohibiting the Special Deputy Tahsildar for the Income-tax Collection, Ramanathapuram Collector's Office, Madurai, from taking any proceedings for recovery of the sum of Rs. 20,930 from the petitioner in pursuance of his notice, dated 17th July, 1956.

M. R. M. Abdul Karim, for Petitioner.

C. S. Rama Rao Sahib, for Respondents.

The Judgment of the Court was delivered by

Rajagopalan, O.C.J.—This application under Article 226 of the Constitution for the issue of a writ of prohibition arose out of proceedings to assess the income-tax payable by T.M. Khadir Mohideen on his income during the year of account ending with 31st March, 1948, in the assessment year 1948-49. Khadir Mohideen died on 11th August, 1948. The petitioner Kassim is one of the legal representatives of the deceased Khadir Mohideen. Notices under section 22 (2) of the Income-tax Act were served on the petitioner and his brother, Syed Mohamed after the death of the assessee Khadir Mohideen. The assessment was completed in 1953. Notices of demand under section 29 of the Act to pay the balance of the tax payable were served on the petitioner on 31st March, 1953, and on his brother on 2nd April, 1953.

* W.P. No. 896 of 1956. 29th November, 1957.

As the amount remained unpaid, the Income-tax Officer (first respondent) issued a certificate under section 46 (2) of the Act to the Collector of Ramanathapuram on 26th October, 1953. On 17th July, 1956, the Speical Deputy Tahsildar (second respondent), a revenue subordinate of the Collector, issued notices to the petitioner and his brother, informing them that if the amount was not paid proceedings would be taken under the Revenue Recovery Act. The petitioner pleaded that no proceedings could be taken against him under section 46 (2) of the Income-tax Act, which provided for the recovery of the tax as if it were an arrear of land revenue by recourse to the Revenue Recovery Act, and has applied for a writ of prohibition to restrain the authorities from applying the provisions of the Revenue Recovery Act to him.

It should be recorded that the validity of the assessment to income-tax was not challenged in these proceedings. The amount ultimately demanded of the petitioner the payment of which was required by the notice, dated 17th July, 1956, included a sum of Rs. 1000, levied apparently under section 46 (1) of the Act as penalty for the non-payment of the tax due. The validity of the order imposing that penalty was not challenged either in these proceedings. The limited attack was on the certificate issued under section 46 (2) of the Act and the further recourse to the provisions of the Revenue Recovery Act on the basis of that certificate.

Section 46 (2) of the Income-tax Act runs :

"The Income-tax Officer may forward to the Collector a certificate under his signature specifying the amount of arrears due from an assessee and the Collector, on receipt of such certificate, shall proceed to recover from such assessee the amount specified therein as if it were an arrear of land revenue".

We shall omit the proviso as it is not relevant for our present purposes.

The question to be determined is, whether the sum demanded of the petitioner on the basis of the certificate issued under section 46 (2) constituted "arrears due from the assessee," and whether the petitioner was such an assessee within the meaning of section 46 (2). If that question is answered in the negative, we have to hold that the Income-tax Officer had no jurisdiction to issue the certificate and that the certificate was invalid. On the basis of such an invalid certificate the Collector would have no jurisdiction to recover the amount shown in the certificate as if it were an arrear of land revenue under the provisions of the Revenue Recovery Act.

The logical extension of what we laid down in *Alfred* v. *Additional Income-tax Officer*[1], compels us to answer the question in the negative.

It was the validity of recourse to section 46 (1) of the Act that arose for consideration in *Alfred's case*[1]. The assessment in that case was under section 24-B (2) of the Act after the death of the assessee Ebenezer. The notice under section 29 of the Act was served on Alfred, son of the deceased assessee. When the tax was not paid a penalty was imposed on Alfred under section 46 (1), treating him as the assessee in default. After examining the scope of the definition of "assessee' in section 2 (2) of the Act as well as the scope of section 29 and each of the three sub-sections of section 24-B of the Act, we stated at page 713 :

"If through all the three sub-sections (of section 24-B) the same principle runs, that the extent of the liability of the executor, administrator or other legal representative of the deceased person is limited by the possession of the assets of the deceased person, there should be little difficulty in placing the executor, administrator or other legal representative of the deceased person, who comes within the scope of either section 24-B (2) or section 24-B (3) of the Act in the category of persons referred to in section 29 of the Act as "other person liable to pay such tax", as distinct from the "assessee". For the purpose of section 29, therefore, it is the deceased that would be the assessee, and the executor, administrator or other legal representative, in whose presence the income of the deceased is assessed either under section 24-B (2) or under section 24-B (3), would not be the assessee but merely a person liable to pay the assessed tax."

In construing the term "assessee in default" in section 46 (1) of the Act we pointed out at page 710:

"To establish "default" in payment of the assessed tax, within the meaning of section 45 two conditions at least have to be specified: (1) failure topay the amount specified in the notice of demand issued under section 29, and (2) that failure must be that of an assessee..........Obviously,

1. (1956) 2 M.L.J. 149 : 29 I.T.R. 708.

when section 46 (1) refers to "an assessee in default" it is the assessee who is in default within the meaning of section 45 that is meant. A penalty can be imposed under section 46 (1) only on such an assessee in default".

The limits of the legal fiction enacted by section 24-B (2) was thus explained by us at page 714:

"In our opinion, the legal fiction enacted by section 24-B (2) is only for the purpose of assessment. For the purpose of initiating and completing the assessment on the income of the deceased, his legal representative is deemed by that legal fiction to be the assessee. With the completion of the assessment, the necessity for that legal fiction ends. The liability to pay the assessed tax has to be enforced under section 29 of the Act. For the purposes of section 29 of the Act, the legal representative would not himself be an assessee, but he would, none the less, be a person liable to pay the tax. When there is such a specific statutory provision to enforce the liability of the legal representative in section 29 of the Act, there is no need to continue the fiction enacted by section 24-B (2) further to provide also for the collection of the assessed tax."

In *Alfred's case*[1], we specifically left open the scope of section 46 (2) of the Act (*see* page 716). It is that question we have to decide now in these proceedings.

The assessment with which we are now concerned was also under the enabling provisions of section 24-B (2). The income of the deceased Khadir Mohideen in the year of account ending with 31st March, 1948, was assessed to tax as if his legal representatives including the petitioner were the assessees within the meaning of section 24-B (2). As we pointed out in *Alfred's case*[1], section 24-B (2), itself did not provide for the collection of the assessed tax. Section 29 provided the machinery for collection. As we have already pointed out in *Alfred's case*[1], the legal fiction enacted by section 24-B (2) extended only to the assessment to tax and did not extend to the collection thereof. Section 46 (2) of the Act provided only for collection. The fiction of section 24-B (2), under which the petitioner was the assessee for purposes of assessment, cannot therefore be extended when we have to examine the scope of the expression "assessee" in section 46 (2) of the Act.

In our opinion the apparent difference in language between section 46 (1), which refers to an assessee in default, and section 46 (2), where the reference is to the arrears due from an assessee, makes no real difference in seeking the principle to apply. As we pointed out in *Alfred's case*[1], to establish that an assessee is in default within the meaning of sections 45 and 46 (1) what has to be established is (1) failure to pay the amounts specified in the notice of demand issued under section 29, and (2) that failure must be that of an assessee. It is the same set of conditions that has to be satisfied to establish that arrears are due from an assessee within the meaning of section 46 (2). 'Arrears' is not a term of art, as explained in Burrows' Words and Phrases, Volume I, page 231. There must be a legal obligation to pay the amount which has been ascertained or is easily ascertainable, for example, *ex facie* the document that evidence that obligation. If that amount is not paid on or before the date on which the payment fell due, that amount is in arrears, as that expression is normally understood. In other words, there must be a legal obligation and a default in the performance of that obligation before any arrears can emerge. Analogous to section 46 (1), section 46 (2) requires two conditions to be satisfied, (1) the amount must be in arrear, and (2) those arrears must be due from an assessee. In the case of the petitioner there should be no difficulty in establishing the first of these conditions. The amount lawfully demanded of him under the notice issued under section 29 of the Act was not paid within the time specified in the notice. That amount was in arrears, the real question is, whether they were arrears due from an assessee within the meaning of section 46 (2) of the Act.

If, in the case of an assessment completed under section 24-B (2), the legal representative of the deceased assessee could not be viewed as himself an assessee within the scope of section 46 (1), it is a little difficult to hold that he would be an assessee within the scope of section 46 (2) of the Act. As we explained in *Alfred's case*[1], the petitioner would be not "an assessee" but only "the other person liable to pay" the assessed tax, for the collection of which tax section 29 provided. The petitioner's obligation to pay the amount assessed under section 24-B (2) arose on the service of

1. (1956) 2 M.L.J. 149 : 29 I.T.R. 708.

the notice under section 29 of the Act. The context of section 29, which marks off the stage of assessment from that of collection, restricted the scope of the interpretation to be placed on the expression "assessee from whom arrears are due" as it occurs in section 46 (2), which is part of the statutory machinery for the collection of the assessed tax, despite the fairly wide definition of "assessee" in section 2 (2) of the Act. We explained in *Alfred's case*[1], that the liability of a legal representative of a deceased assessee whose income was assessed to tax under section 24-B (2) is limited by the possession of the assets of the deceased. In such cases the word "assessee" has to be given the same meaning both for purposes of section 46 (1) and 46 (2). No more than section 46 (1) does section 46 (2) limit the liability of the assessee who is in default or in arrears. If the legal representative of the deceased assessee is himself an assessee not only for the purpose of assessment to tax under section 24-B (2) but also for purposes of collection under section 46 (2), the liability of the legal representative could not, under the terms of section 46 (2) be limited to the possession of the assets of the deceased. If the basic principle is that, where an assessment is completed under section 24-B (2), the liability of the legal representative is limited by the extent of the assets of deceased in the possession of that legal representative, for the imposition of any additional burden on that legal representative there must be statutory provision, either in express terms or by necessary intendment. We are unable to discover any such provision in section 46 (2) any more than in section 46 (1). To include a legal representative in such cases within the scope of the statutory expression "assessee" in section 46 (2) would necessarily involve an imposition of vicarious liability for which we can find no statutory sanction. As we said, section 46 (2) itself does not in any way limit the liability of the assessee from whom the arrears are due. If the expression "assessee" in section 46 (2) were to include the legal representative of a deceased assessee whose income was assessed under section 24-B (2), on a certificate issued under section 46 (2) all the assets of that legal representative, his own as well as those of his deceased predecessor-in-interest, could well be proceeded against. We emphasise this feature only to show that the Legislature could not have intended to impose and did not impose such an unlimited liability, inclusive of what would be a vicarious liability on a legal representative of an assessee when the assessment was completed under section 24-B (2) of the Act.

The learned counsel for the Department referred to *Rajah Manyam Meenakshamma* v. *Commissioner of Income-tax*[2]. In that case, after referring to the provisions of sections 28, 31 and 33 as well as those of section 24-B of the Act, Subba Rao, C.J., observed at page 289:

> "A combined reading of these provisions indicates that a legal representative, who is liable to pay tax from and out of the estate of a deceased person, would be an assessee as defined in the Act".

That decision may have no real bearing on the question at issue before us, whether the petitioner was an assessee within the meaning of section 46 (2) of the Act. We have to point out that an appeal either under section 30 or under section 33 of the Act is still at the stage of assessment to tax. In *Alfred's case*[1], we pointed out that the legal fiction enacted by section 24-B (2) is applicable at the stage of assessment but not at the stage of collection. We are concerned not with the question, whether the legal representative of a deceased assessee is not himself an assessee for any purpose whatsoever under the Act, but with the limited question whether such a legal representative is an assessee within the maning of section 46 (2) of the Act. That question did not arise for consideration in *Rajah Manyam Meenakshamma* v. *Commissioner of Income-tax*[2].

In our opinion the petitioner was not an "assessee' within the meaning of section 46 (2) of the Act. The Income-tax Officer had no jurisdiction to treat him as an assessee for the issue of a certificate under section 46 (2). Since the jurisdiction of the Collector depended on a valid certificate issued under section 46 (2), the notice issued by the Deputy Tahsildar on 17th July, 1956, was also without jurisdiction.

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1. (1956) 2 M.L.J. 149 : 29 I.T.R. 708. 2. (1956) An. W.R. 645 : 30 I.T.R. 286.

Though it was a writ of prohibition that the petitioner asked for, we consider that the appropriate remedy would be to grant a writ of *certiorari* to set aside the certificate issued under section 46 (2) of the Income-tax Act by the first respondent and to set aside the notice dated 17th July, 1956, issued by the second respondent. Such a writ of *certiorari* will issue.

There will be no order as to costs.

R.M. *Certiorari issued.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE BALAKRISHNA AYYAR.

Kunchithapatham Pillai *Petitioner**

v.

Ranganadham Pillai *Respondent.*

Madras Cultivating Tenants Protection Act (XXV of 1955), section 2 (a)—"Cultivating tenant"—Tests for determining.

In order to qualify as a "cultivating tenant" within the meaning of section 2 (a) of Madras Act XXV of 1955 it is not necessary that a person should put his own muscular effort into the soil. It is sufficient if the land is cultivated under his direct supervision and if further he assumes the risks of the cultivation, and is not the paid agent in this respect of someone else.

Petition under section 115 of Act V of 1908 and section 6-B of the Madras Act XXV of 1955 praying the High Court to revise the Order of the Court of the Revenue Divisional Officer, Chidambaram, dated 11th September, 1957 and passed in O.S. No. 182 of 1957.

K. N. Subramanian, for Petitioner.

M. Srinivasagopalan, for Respondent.

The Court delivered the following

JUDGMENT.—In order to qualify as a "cultivating tenant" within the meaning of section 2 (a) of the Madras Act XXV of 1955 it is not necessary that a person should put his own muscular effort into the soil. It is not necessary that he himself should plough the field or irrigate it or weed it or harvest it or thrash the grain that the field may yield. It is sufficient if the land is cultivated under his direct supervision and if further he assumes the risks of the cultivation. If he can decide what crops he would grow, when he would grow them and where he would grow them, if he can direct what labour should be employed and when and where and for what purposes, if he can decide what fertilizer he would use and in what proportions, if he can decide and direct when the field should be harvested and how the harvest should be disposed of, if he has direct control over such operations and if further he is not the paid agent in this respect of someone else, he would be a cultivating tenant within the meaning of the Act. The contention of the respondent that as he does not contribute his physical labour to the cultivation he is not a cultivating tenant, must fail. The next contention of the petitioner that he was not aware of the sale in favour of the respondent till November, 1956, is demonstrated to be false by Exhibits P-2 to P-6.

The final contention that there was no apportionment of the rent must also be negatived in view of the evidence of P.W. 2.

This petition is dismissed with costs. Time to pay arrears of rent 2 weeks from today.

K.S. *Petition dismissed.*

* C. R. P. No. 1218 of 1957. 8th January, 1958.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. P. RAJAGOPALAN, *Officiating Chief Justice* AND MR. JUSTICE RAJAGOPALA AYYANGAR.

S. Marimuthu Pillai and others .. *Appellants**

v.

T. R. Krishna Joshi and others .. *Respondents.*

Madras Estates Land Act (I of 1908), section 6-A—Scope—Kudivaramdar acquiring the melvaram interest in his holding—Nature of interest—Madras Estates (Abolition and Conversion into Ryotwari) Act (XXVI of 1948), section 3(b) and (e)—Whether this interest stands transferred to the Government on the estate being notified entitling the holder for compensation—Section 44 (1)—Apportionment of compensation—Scope and extent of powers of the Tribunal under the Act.

Section 6-A of the Madras Estates Land Act in express terms states that there is no merger in cases of acquisitions of melvaram interests by a kudivaramdar. If merger be negatived the interests must continue to be separate and held under distinct titles. As the statute has made express provision against the destruction of the ryoti right, no Common Law doctrine can apply to such cases.

It would not be inapt to describe such interest as assignment of a landholder's interest which does not constitute the assignee a landholder within the meaning of section 3 (5) of Act I of 1908. Though the terminology is anomalous, yet if these kudivaramdars had acquired a right and that right inhered in them as a separate and distinct interest capable of transfer there may not be any impropriety in this description. If such interests again came to he held by separate individuals by reason of a transfer of the acquired melvaram to another, in the hands of the transferee it would assume its normal characteristic as a landholder's interest within the meaning of section 3 (5) of Act I of 1908.

When under the terms of section 3 (*b*) of the Madras Estates (Abolition and Conversion into Ryotwari) Act, 'the estate' becomes transferred to the Government and becomes vested in them the interest thus transferred would include not merely the interest of the 'landholder' as defined in section 3 (5) of Act I of 1908 but also the melvaram interest held by such persons as the appellants. The language employed in section 3 (*b*) of Act XXVI of 1948 is of the most comprehensive character and is not confined to any designated interest. The separate and distinct interest and transferable interest in the melvaram, apart from the kudivaramdar interest in their holding, is comprehended within section 3 (*b*) of Act XXVI of 1948. To hold that such an interest was not transferred to Government would lead to anomalous results.

By reason of section 3 (*e*) of Act XXVI of 1948 the appellants kudivaramdars who had acquired the melvaram rights were the persons who became entitled to compensation from the Goverment as provided in the Act.

Though no provision was made for the type of interest possessed by the appellants under the Rules promulgated under section 44 of Act XXVI of 1948, if under sections 3 (*b*) and 41 (2) of Act XXVI of 1948 read with section 42 the appellants were entitled to any portion of the compensation amount, the same should not be restricted or abrogated by the Rules. Apart from this though they were not landholders as defined in section 3 (5) of Act I of 1908 they held a landholder's interest or an aliquot part thereof in the estate. The appellants were thus entitled to a share in the compensation.

In effecting apportionment among the claimants of the compensation deposited with them the components which formed the basic annual sum was not material or relevant. The duty of the Tribunal is confined to apportioning the amount deposited with them to the persons and among the interests referred to in sections 42 and 46 of Act XXVI of 1948 and does not extend to the determination of propriety of or quantum of compensation deposited by the Government. The Tribunal had therefore to proceed on the basis that the sum deposited with them was the compensation for the entirety of interests in the estate as enacted in section 25 of Act XXVI of 1948 the entirety of compensation payable in respect of the rights transferred under clause (*b*) had ceased and determined under clause (iii). *Vide* section 3 (*e*) of Act XXVI of 1948.

If any of the parties or classes of interests entitled to compensation or any share therein were aggrieved by the quantum of compensation deposited with the Tribunal the authority vested with jurisdiction to determine the matter was not the Tribunal making apportionment under sections 42 to 46 of Act XXVI of 1948 but the Board of Revenue as enacted in section 39 (5).

Case-law discussed.

Appeals against the orders of the Estates Abolition Tribunal, Mathurai, dated 7th June, 1954 and made in O.P. Nos. 979, 980, 984, 985, 1086, 986, 988, 989, 991, 994, 995, 996, 997, 999, 1000, 1002, 1003, 1004, 1047, 1060, 1061, 981, 982 and 992 of 1953 respectively.

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* S.T.A. Nos. 2 to 23, 56 and 57 of 1955. 18th November, 1957.

M. S. Venkatarama Aiyar, for Appellants.

R. Aravamudha Ayyangar and *E. A. Viswanathan*, for Respondents.

The Judgment of the Court was delivered by

Rajagopala Ayyangar, J.—These appeals arise out of a common order of the Estates Abolition Tribunal, Mathurai, in a batch of petitions filed under section 42 of the Madras Estates (Abolition and Conversion into Ryotwari) Act, 1948, Madras Act (XXVI of 1948) seeking payment of advance compensation deposited with the Tribunal in respect of the Karungalur estate in Tanjore district.

A sum of Rs. 35,913, was deposited with the Tribunal under section 54-A of the Abolition Act in respect of the inam estate of Karungalur. As many as 42 petitions were preferred to the Tribunal seeking payment of proportionate shares in the sum so deposited. The Tribunal ordered four of these petitions and dismissed the rest. Appeals have been preferred by the petitioners whose claims have been rejected by the Tribunal.

It is necessary to state a few facts in order to understand the basis of the rejection of the appellants' claims by the Tribunal and the contentions advanced before us questioning the correctness of that rejection.

It is common ground that the village was an inam estate falling within the definition of section 3 (2) (*d*) of the Estates Land Act the landholder being entitled only to melvaram in the village. The village of Karungalur formed part of the Tanjore Palace Estate and was allotted to the Senior Prince of Tanjore under the final decree in O.S. No. 3 of 1919 on the file of the District Court, Tanjore West. Karungalur had three hamlets, *viz.*, Kulamangalam, Karungalur thottam and Gudalur thottam and the advance compensation amount deposited represented the sum due for the entire group. The hamlets of Karungalur became the property of the Junior Prince of Tanjore; he was adjudicated an involvent in I.P. No. 40 of 1933 with the result that these came to be vested in the Official Receiver, Tanjore West. The several appellants originally owned kudivaram interest in the lands in their occupation and at a sale held by the Official Receiver, the melvaram interest of the landholder, the Junior Prince, in their holdings was purchased by the kudivaramdars. Under the provisions of the Madras Abolition Act these appellants would be entitled to the grant of ryotwari pattas in respect of their holdings.

The question, however, under debate is whether these appellants are entitled to any portion of the compensation deposited with the Tribunal as representing compensation due to the melvaram interest purchased by them at the sale held by the Official Receiver. The Tribunal held that they were not, and that is the only matter in controversy in the appeals.

The reasoning on the basis of which the Tribunal rested its decision was shortly this :—

1. When a person who holds a kudivaram interest in the land, obtains a transfer by purchase or otherwise of the melvaram interest in the same land, such a person does not become a landholder within the definition of the term in section 3 (5) of the Madras Estates Land Act but he remains merely a kudivaramdar ;

2. When the estate was notified under the Abolition Act (Madras Act XXVI of 1948) it was the interest of the 'landholder', that became vested in the Government under section 3 (*b*) of the Act and the compensation provided by that Act was only for the taking over of that interest;

3. In regard to the appellants' interest as kudivaramdars, their rights were safeguarded by the proviso to section 3 (*d*) of the Act and they were given the right to obtain ryotwari pattas in respect of their holdings under section 11.

4. Prior to the notification and taking over of the estate, by reason of their purchase of the melvaram interest they might, no doubt, be exempt from the payment of rent to any landholder because the hand that had to pay the rent and

the hand that was entitled to receive was the same but as the Abolition Act provided for the imposition by the Government of assessment on such lands, (*vide* section 3 (*g*) and sections 22 and 23 of the Act) the land revenue became payable on such lands. The Abolition Act provided no compensation for this loss of benefit which the kudivaramdars sustained ;

5. The compensation actually deposited with the Tribunal by the Government in respect of this Inam Estate was computed on the basis of the basic annual sum which most probably did not include the ryotwari demand payable on the holdings of the appellants. For this reason the compensation which the Tribunal was called on to apportion did not include any sum attributable to any interest of the appellants. Consequently the appellants could not make any claim to the compensation now in deposit with the Tribunal.

We might even at the outset add that the submissions of the learned counsel for the respondents were identical with those which we have set out above, and the question for consideration is whether these proceed on the correct interpretation of the provisions of the Estates Land Act and the Abolition Act.

The first question that arises for consideration is as to the effect of the purchase of the melwaram interest by a person owning the kudivaram in the land. The Tribunal has based its decision against the appellants principally on two decisions of this Court, *viz.*, *Marina Veeraswami* v. *Boyinappalli Venkatarayudu*[1], and *Ganjam Manikyamba* v. *Pasala Mallayya*[2]. But before discussing these, it would be necessary to refer to the relevant provisions of the Estates Land Act. Section 6 (1) as enacted in 1908 reads :

> " Subject to the provisions of this Act, every ryot now in possession or who shall hereafter be admitted by a landholder to possession of ryoti land not being old waste situated in the estate of such landholder shall have a permanent right of occupancy in his holding."

It is not necessary to refer to the other sub-sections except to the last section 6 (6) which then ran :

> " A person holding land as an Ijardar or farmer of the rent shall not while so holding, acquire, otherwise than by inheritance or devise, a right of occupancy in any land comprised in the ijara or farm ".
>
> *Explanation.*—"A person having a right of occupancy in the land does not lose it by subsequently becoming interested in the land as landholder or by subsequently holding the land in ijara or farm".

Section 6 was followed after section 7 which is not material by section 8 (1) reading :

> *Merger of occupancy.*—"Whenever before or after the commencement of this Act the entire estate of the landholder and the occupancy ryot in any land in the holding have become united by transfer, succession or otherwise in the same person such person shall have no right to hold the land as a ryot but shall hold it as a landholder ; but nothing in this sub-section shall prejudicially affect the rights of any third person ".

Section 8 (3) which continues in the same form even now ran ;

> "The merger of the occupancy right under sub-sections (1) and (2) shall not have the effect of converting ryoti land into private land ".

Section 3 (5) defines the landholder thus :

> "Landholder" means a person owning an estate or part thereof and includes every person entitled to collect rents of the whole or any portion of the estate by virtue of any transfer from the owner or his predecessor-in-title or of any order of a competent Court or of any provision of law.

The question debated before this Court on several occasions was as to the relative scope of section 8 (1) and the *Explanation* to section 6 (6) of the Estates Land Act, 1908. The view which ultimately prevailed was that the *Explanation* to section 6 (6) was in the nature of a rider or a *proviso* to section 8 (1) and that in cases where the landholder acquired the rights of a kudivaramdar in a holding there was a merger of their interests with the result that what he acquired was only the holding and not the ryoti interest in the land, that is,

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1. (1920) 39 M.L.J. 225 (F.B.). 2. (1924) 47 M.L.J. 393 : I.L.R. 47 Mad. 942.

that the land did not cease to be ryoti land and that consequently if at a subsequent date the landholder let any person into occupation of the land for the purpose of agriculture, such occupant acquired a statutory right of occupancy under section 6 (1) of the Act. It was also decided that where an occupancy ryot acquired the melvaram interest in the holding, his ryoti interests were not affected, and that he did not become

"a landholder with the consequence that in such a case where the ryot, leased the lands in his holding to another, the lessee did not acquire occupancy rights as holding ryoti land under a landholder"

within the meaning of section 6 (1).

The difficulty which faced the learned Judges in deciding these cases, arose out of the wide language employed in section 8 (1) which was apt to include cases both of the landholder's acquisition of a holding as well as the ryot's acquisition of the melvaram interest, for the section spoke of "the interest of the landholder and the occupancy ryot becoming united" and the problem was now to reconcile this with the express provision contained in the *Explanation* to section 6 (6). The facts which gave rise to the Full Bench decision in *Marina Veeraswami* v. *Boyinapalli Venkatarayudu*[1] were briefly these. The matter before this Court arose out of a suit for eviction of a tenant cultivating lands in the zamindari estate of Pithapur. The plaintiff's predecessors-in-title had originally occupancy rights in the land they holding it as service inam. The plaintiff, however, entered into an arrangement with the zamindar by which beneficial tenure was created relieving him the inamdar of the obligation of rendering service and in lieu thereof paying a small annual rent. The defendant was a tenant who had been let into possession by the plaintiff's predecessor. The defendant claimed that by reason of the arrangement between the zamindar and the plaintiff's predecessors they had become "landholders" and that as the holding was a ryoti land in an estate, the tenants let into possession obtained occupancy rights and that no suit for eviction would lie in a civil Court. This defence succeeded before the trial Judge but the decision was reversed on appeal and the matter was brought up in this Court in a second appeal filed by the unsuccessful defendant. Spencer, J., who made the order of reference to a Full Bench expressed himself thus as to the questions to be referred :

"The solution of this question depends first on the legal construction to be put on the definition of landholder in section 3 (5); secondly on the class of cases to which the merger of occupancy rights in section 8 (1) applies and thirdly as to the effect to be given to the *Explanation* to section 6 of the Madras Estates Land Act, and as divergent views have been expressed by different benches of this High Court on the first two points and as the meaning of the expression "subsequently becoming interested in the land as landholder" in the *Explanation* to section 6 is somewhat obscure, we refer to a Full Bench the following questions :—

1. "Whether at any time before the institution of this suit the respondent acquired the status of a landholder in consequence of the grant of the suit-lands by the zamindar to him on a favourable quit rent".

* * * * * *

As the Full Bench did not answer the second question referred to it, it is unnecessary to set it out. The material portion of the answer of the Full Bench is contained in the following sentence :

"The plaintiff's ancestors were estate ryots before the lands became karnam service inam lands and their lands again became ryoti land within the meaning of the Act, under the definition in section 3 (16) when the karnam service came to an end. The effect of Exhibits C and IV (*b*) (the arrangement with the zamindar) was to grant the plaintiff who thereby regained the status of a ryot, a remission of the greater portion of the rent payable by him to the zamindar and not to transfer to him any right to collect rents from third persons".

For this reason the Full Bench held that the plaintiff was not "a person entitled to collect the rents of the whole or any portion of the estate by virtue of any transfer from the owner or his predecessor-in-title", within the meaning of section 3 (5).

1. (1920) 39 M.L.J. 225 (F.B.).

The other decision referred to by the Tribunal, and relied on by the learned counsel for the respondents before us, is *Manikyamba* v. *Malayya*[1]. It is sufficient to refer to the headnote in the Law Journal Report to understand the scope of the decision :

"The plaintiffs who were darmila inamdars brought a suit in a civil Court for recovery of possession of the suit properties on the strength of an oral lease given to the defendant. They alleged that they owned kudivaram interest to start with and that it was only subsequently that they obtained by grant the melvaram interest from the zamindar. On the question arising whether the suit was cognizable by the civil or revenue-Courts it was held "If the plaintiffs prove that they originally owned the kudivaram interest and were subsequently granted the melvaram they would not be landholders within the meaning of section 3 (5) of the Estates Land Act and could maintain the suit in the civil Court."

These two decisions are, clear authorities for the position, that where a person owning kudivaram acquires an interest in the melvaram, quoad his holding, there is no coalescence of the two interests under section 8 (1) but that on the other hand, the case is governed by the *Explanation* to section 6 (6) that is, that he still continues to hold the ryoti interest in the land. Therefore far from supporting the respondents, they appear to favour the submissions of the appellants before us. Whatever difficulties were caused by reason of the language of section 8 (1) and by the *Explanation* to section 6 (6) having to be read as an independent provision and an exception to the rule of merger enacted in section 8 (1), all these were removed by amendments effected to the Estates Land Act by the Madras Estates Land (Amendment) Act, 1934 (VIII of 1934). The *Explanation* was cut out from section 6 (6) and it appeared as a new section, section 6-A ceasing to have any connection with the subject-matter of the main part of section 6 (6) re-numbered as section 6 (5). Section 8 (1) also underwent a modification and it was enacted to read :

Section 8 (1): *Merger of occupancy rights* :—Whenever before or after the commencement of this Act the occupancy right in any ryoti land vests in the landholder he shall have no right to hold the land as a ryot but shall hold it, as a landholder but nothing in this sub-section shall prejudicially affect the rights of any third person".

The amendments, were therefore, a legislative affirmation of the interpretation which this Court placed on section 8 (1) and the *Explanation* to section 6 (6) and their relationship *inter se*.

No doubt, these two decisions as also others to which it is not necessary to refer, have laid down that where a kudivaramdar acquired an interest in the melvaram over his holding he did not thereby become a "landholder" within the meaning of section 3 (5). This was meant only as a negation of any merger. If he became a landholder within the meaning of section 3 (5) in respect of his holding, the result would have been, that if he leased the lands in respect of which he admittedly had kudivaram interest his tenant would have become a ryot entitled to occupancy rights under section 6 (1) of the Act and thereby he would have become divested of occupancy right. He would have become a landholder, only if there was a merger and it was held in these decisions that the *Explanation* to section 6 (6) was designed to avoid this result. That a kudivaramdar who acquired a melvaram interest did not thereby become a "landholder" cannot however, finally dispose of the point arising in these appeals. The question still to be answered is "If the kudivaramdar acquired a melvaram interest and there is no merger of that interest with the kudivaram, which the acquirer already possessed, what is the nature of the acquired interest in his hands ? "If *ex hypothesi* there is no merger the acquired interest must still be intact. This is how Burn, J., analysed the position in *Sreemantha Raja Yarlagadda Mallikarjuna Prasada Naidu* v. *Subbiah*[2]. The learned Judge said :

"The scheme of the Act appears to me to be to divide all cultivable land into two categories: (1) private land. . . . . (2) ryoti land—in all such land two separate interests exist—the melvaram and kudivaram interest—the former is vested in the landholder and the latter in the ryot."

"It seems to me that one main object of the tenancy law is to preserve these two interests and keep them separate. The kudivaram interest may be in abeyance but it can never be destroyed. The landholder cannot prevent the acquisition of the right by a ryot—A landholder can hold the

1. (1924) 47 M.L.J. 393 : I.L.R. 47 Mad. 942. 2. (1919) 39 M.L.J. 277.

kudivaram interest in one case only, *i.e.*, where he possessed it before he became the landholder (*vide Explanation* to section 6 and even then the two interests remain separate."

It was the same idea that was expressed by Kumaraswamy Sastri, J., in *Gadadhara Das* v. *Suryanarayana Patnaik*[1],

"Where the grantee of the melvaram was himself the occupancy ryot it is difficult to see how the grant of the melvaram interest to him can divest him of that character so as to convert his sub-tenant into a permanent occupancy ryot. . . . . . . I think it would be reasonable to hold that the mere fact that an occupancy ryot gets an interest in the melvaram would give the sub-tenants (who till then had no rights of occupancy and who could be evicted) rights of permanent occupancy and put the grantee of the melvaram in a decidedly worse position. In all such cases when there is no merger under any of the provisions of the Act, the right of the inamdar as an occupancy ryot remains in him and the effect of his acquiring an interest in the melvaram is not to extinguish his rights as an occupancy ryot and convert him into a landholder so as to bring his sub-tenant within the provisions of section 6 (1)".

The learned Judge then held that the *Explanation* to section 6 (6) prevented such a result and he said:

"It was never the intention of the Legislature that persons who already acquired right of permanent occupancy or who acquired it by virtue of the inam grant should lose the benefit simply because they got an interest in the melvaram as well."

We might note in passing that though Kumaraswami Sastri, J.'s was a dissenting judgment, the other two learned Judges being a majority, the view expressed by Kumaraswami Sastri, J., was approved as correct by a later Bench consisting of Spencer and Odgers, JJ., in *Bhupathiraju* v. *Venkataratnam*[2].

One other test which might be applied to find out whether the acquired melvaram interest still remained as such in the hands of the acquirer would be to find out whether such an interest could not be alienated by him. Though there are no decisions on the point it is clear to us on principle that such an acquirer can in his turn alienate what he had acquired so as to render his alienee "a landholder", that is, a person who would be a mesne assignee of the interest of the landholder—one who would be entitled to the perception of rents from ryoti land in the estate. If this were the true legal position it would follow that the appellants possessed before the notified date an interest in the land, other than as ryots in the estate.

Learned counsel for the respondents urged that the true nature of the appellants' interest before the notified date could best be described by saying that they held the ryoti lands freed from the obligation to pay rent to the landholder and that this beneficial tenure was adversely affected by reason of the provisions of section 3 (*g*) and section 11 of the Abolition Act—injurious affections for which the Act provided no compensation. We are unable to accept the theory underlying this submission which proceeds upon the basis of some kind of merger. The underlying postulate of the respondents' argument was something like this. Where section 8 (1) applies and there is a merger the occupancy right gets extinguished and the landholder obtains possession, so to speak, of the land comprising the holding without the transfer to him of the tenure on which the previous occupant held it. In cases covered by section 6-A the landholder part becomes extinguished and gets merged in the ryoti interest, so that thereafter the person holds not two distinct and separate interests but a ryoti interests alone though on modified terms. We cannot agree with this theory which in effect introduces, as if by a side wind, the concept of a merger. In express terms section 6-A of the Estates Land Act states that there is no merger in cases of acquisitions of melvaram interests by a kudivaramdar. If merger be negatived, the interests must continue to be separate and held under distinct titles as Burn, J., observed. Nor is there any possibility of invoking any Common Law doctrine of merger in such cases, because if it were applied it is the smaller interest that will get merged in the larger, the carved out in the reversion, with the result that it would be the kudivaram interest that will get extinguished, if the Common Law rule applied. As the statute has made express provision against the destruction of the ryoti right, the Common Law doctrine cannot apply to such cases. We are consequently unable to accept the theory that as a result of the acquisition of the melvaram interest

1. (1921) 41 M.L.J. 97 at 105. 2. (1921) 41 M.L.J. 512.

no separate melvaram interest inhered in the acquirer but that only the nature of the incidents of the right he already possessed as an occupancy ryot underwent some modification.

No doubt it is somewhat difficult to describe in precise language the separate or distinct interest held by the appellants by reason of their purchase of the melvaram interest but such lack of words which precisely connote the interest is a defect of vocabulary and can hardly be a reason for denying the reality of the existence of the right.

Decisions of this Court have laid down and if we may say so, with respect, correctly, that a kudivaramdar does not become a landholder within the meaning of section 3 (5) of the Estates Land Act by reason of such acquisition. In fact he would become a landholder only on the application of the principle of merger which the statute in express terms negatives. But this is only for the purpose of preserving the ryoti interest to the acquirers in their lands. Extracts from the observations of Burn, J., and Kumaraswami Sastri, J., which we have already made amply bear this out, but we consider that it would not be inapt to describe such interest as "assignment of a landholder's interest" which does not constitute the assignee a landholder within the meaning of section 3(5). Undoubtedly the terminology is somewhat anomalous but if these kudivaramdars had acquired a right and that right inhered in them as a separate and distinct interest capable of transfer we do not see any impropriety in this description. As already stated if such interests again came to be held by separate individuals say by reason of a transfer of the acquired melvaram to another, in the hands of the transferee it would assume its normal characteristic as a landholder's interest within the meaning of section 3 (5) of the Act.

We therefore, consider that the decisions referred to by the Tribunal and the other decisions which were placed before us by the learned counsel for the respondents far from supporting the submission that the acquired interest cease to exist as a separate entity have led us to the conclusion that on the notified date the appellants possessed not merely the kudivaram interest in the lands but something in addition, that being the interest in the melvaram which they acquired by reason of their purchase at the auction held by the Official Receiver.

This brings us to a consideration of the provisions of the Estates Abolition Act and the submission of the learned counsel based thereon. The question first to be considered, is whether the Estates Abolition Act has made provision for compensation in respect of the acquired interest in the melvaram which the appellants possessed by reason of their purchase in the auction held by the Official Receiver. Section 3 of the Abolition Act enacts the consequences of the notification of an estate and the portion relevant to the present discussion is contained in section 3 (*b*), (*c*), (*e*) and (*f*) which we shall set out.

Section 3.—With effect on and from the notified date save as otherwise expressly provided in the Act—

* * * * * * *

(*b*) the entire estate (including all communal lands and porambokes, other non-ryoti lands, waste lands, pasture lands, lanka lands, mines and minerals, quarries, rivers and streams, tanks and irrigation works, fisheries and ferries) shall stand transferred to the Government and vest in them free of all encumbrances; and the Madras Revenue Recovery Act, 1864; the Madras Irrigation Cess Act, 1865 and all other enactments applicable to ryotwari areas shall apply to the estate; (*c*) all rights and interests created on or over the estate before the notified date by the principal or any other landholder, shall as against the Government cease and determine;

(*e*) the principal or any other landholder and any other person whose rights stand transferred under clause (*b*) or cease and determine under clause (*c*) shall be entitled only to such rights and privileges as are recognised or conferred on him by or under this Act;

(*f*) the relationship of landholder and ryot shall, as between them, be extinguished.

Estate is defined in section 2(3) as meaning "a zamindari or an under-tenure or an inam estate". Mr. Aravamudha Iyengar, learned counsel for the respondents

contended that under section 3 (*b*) what "stood transferred to the Government" was only the interest of the "landholder" as defined in section 3(5) of the Estates Land Act and that as the appellants were not "landholders" as so defined, their estate did not vest in the Government. He next submitted that sub-section (*c*) had reference to carved out interests where there still subsisted some relationship or tenure between the parent and the interest one put in *i.e.*, between "the landholder" and the holder of that subordinate interest, and that as in the present case it was an out and out sale of a portion of the melvaram without there being any continuing relationship between the landholder and the derivative interest holder; the case of the appellants did not fall within section 3 (*c*) of the Abolition Act. He next referred us to the provision for the computation of compensation and to section 31 dealing with that in relation to inam estates. Section 31 (1) enacts :

"In the case of an inam estate the basic annual sum shall be the aggregate of the sums specified below less the deductions specified in section 35 (*i*) the whole of the gross annual ryotwari demand in respect of all lands in the estate (excluding lanka lands) in respect of which any person other than the landholder is entitled to a ryotwari patta as ascertained under section 32 less the deductions specified therein".

Learned counsel invited us to hold that as no rent was payable on the holdings to "the landholder" in respect of the holdings of the appellants, no amount was taken into account in respect of those lands as the gross annual ryotwari demand within section 31 (1) and he, submitted that the Government had properly excluded the ryotwari demand on the lands included in the holdings of the appellants, from the computation of the basic annual sum and in computing the compensation for the Estate without including these sums. We find ourselves unable to agree in this construction of the provisions. When under the terms of section 3 (*b*): "The estate" becomes transferred to the Government and becomes vested in them, the interest thus transferred would in our opinion include not merely that of "the landholder" as defined in section 3(5) of the Estates Land Act but also the melvaram interest held by such persons as the appellants. The language employed in section 3(*b*) is of the most comprehensive character and is not confined to any designated interests. If, as we have held, the appellants had a separate and distinct and transferable interest in the melvaram, apart from the kudivaram interest in their holding, such an interest is in our opinion, comprehended within section 3(*b*). Such an interest partook of the nature of the landholder's interest, though it did not fall within the definition in section 3(5), for reasons which we have already set out, but was capable of emerging as a pucca landholder's interest if transferred to a stranger. To hold that such an interest was not transferred to Government would lead to anomalous results. If they were not transferred to Government under section 3(*b*) and were not shorn of the interest which ceased and determined under section 3(*c*) it would have to be held that such interests still subsisted. In other words by reasons of the subsistence of such interests the appellants would be enabled to receive ryotwari assessment levied on the lands in their holdings, though they would be bound to pay these assessments as ryots, because of the provisions of section 3 (*g*) read with sections 22 and 23 of the Act. It goes without saying that this would be a most strange result which the Legislature could not have contemplated. If this result has to be avoided, the only other possible position would be to hold, that notwithstanding that there was no transfer to the Government under section 3(*b*) and its not ceasing to exist by virtue of section 3(*c*) it still became extinguished without any specific provision either for its extinguishment or for compensation for such extinguishment. A contention which leads to such a result has necessarily to be rejected. On the other hand the interpretation which we are inclined to place upon section 3(*b*) appears to us to be consistent with principle and in conformity with the language of the enactment and at the same time avoids any injustice.

If section 3 (*b*) is interpreted in this manner, namely, that the transfer to the Government included such rights in the melvaram as the appellants possessed, we shall proceed to consider whether there is anything in the other provisions of the Act to militate against this view. In this connection we may refer to the provisions

of sections 11 and 13 which deal with the grant of ryotwari pattas to ryots and landholders, to the former in respect of their holdings and to the latter in respect generally speaking of their private lands.

Section 11 enacts :—

"Every ryot in an estate shall with effect on and from the notified date, be entitled to a ryotwari patta in respect of

(*a*) all ryoti lands which, immediately before the notified date, were properly included or ought to have been properly included in his holding and *which are not* either lanka lands or lands *in respect of which a landholder or some other person is entitled to a ryotwari patta* under any other provisions of this Act."

The other "provisions of the Act" under which the landholders of the type now under consideration were entitled to patta is section 13 which enacts :—

"In the case of an inam estate, the landholder shall with effect on and from the notified date be entitled to a ryotwari parta in respect of :—

(*a*) all lands (including lanka lands) which, immediately before the notified date (i) belonged to him as private land within the meaning of section 3, clause 10 (*b*) of the Estates Land Act or (ii) stood recorded as private land in a record prepared under the provisions of Chapter XI or Chapter XII of the said Act, not baving been subsequently converted into ryoti land ; and

(*b*) (i) all lands which were properly included or which ought to have been properly included in the holding of a ryot and which have been acquired by the landholder, by inheritance or succession under a will, provided that the landholder has cultivated such lands himself, by his own servants or by hired labour, with his own or hired stock, in the ordinary course of husbandry, from the date of such acquisition or the 1st day of July, 1945, whichever is later and has been in direct and continuous possession of such lands from such later date ; (ii) all lands which were properly included, or which ought to have been properly included, in the holding of a ryot and which have been acquired by the landholder by purchase, exchange or gift, including purchase at a sale for arrears of rent provided that the landholder has cultivated such lands himself, by his own servants or by hired labour, with his own or hired stock, in the ordinary course of husbandry from the 1st of July, 1945 and has been in direct and continuous possession of such lands from that date ;

(iii) all lands (not being (i) lanka lands, (ii) lands of the description specified in section 3, clause (16), sub-clauses (*a*), (*b*) and (*c*) of the Estates Land Act or (iii) forest lands) which have been abandoned or relinquished by a ryot or which have never been in the occupation of a ryot, provided that the landholder has cultivated such lands himself by his own servants or by hired labour, with his own or hired stock in the ordinary course of husbandry from the 1st day of July, 1945 and has been in direct and continuous possession of such lands from that date.

Explanation.—'Cultivate' in this clause includes the planting and rearing of topes, gardens and orchards, but does not include the rearing of topes of spontaneous growth".

It would be noticed that while sub-clause (*a*) comprised what might be termed pucca private lands—lands which were never ryoti and which had belonged to the landholder in absolute right sub-clauses (*b*) to (*d*) deal with lands which were once ryoti and included in the holdings of the ryots and had been acquired by the landholder in the manner there described and had been retained by him in his own *khas* possession and under his own cultivation for the periods set out in the sub-clauses. They would, therefore, be cases of the type of acquisition referred to in section 8 (1) of the Madras Estates Land Act but in regard to which by reason of the personal cultivation by the landholder himself no ryot had acquired occupancy rights under the provisions of the Madras Estates Land Act.

It would be seen that the present appellants would be entitled to ryotwari pattas in respect of their holdings under section 11 and not under section 13. This follows as a logical result of there being no merger. By reason of their acquisition of the melvaram interest they did not occupy their holdings as landholders but continued in occupation as ryots and it was precisely for this reason that to their case section 11 and not section 13 is attracted. Section 11 (*a*), it will be seen, excludes from the operation of the provision "lands in respect of which the landholder is entitled to a ryotwari patta". In the context it would be clear that it applies only to cases where the landholder as such is entitled to a ryotwari patta, that is, in respect of lands governed by section 13. In respect of other lands where he is entitled to a ryotwari patta, it would be under section 11 notwithstanding, we would add, his being entitled to melvaram interest in such lands by an acquisition falling within section 6-A of the Estates Land Act. We do not also consider that section 31 whose terms we have already extracted supports the respondent's contention. The gross annual ryotwari demand referred to in section 31 (1) is that in

relation to all the lands in the estate in respect of which any person other than the landholder is entitled to a ryotwari patta. In respect of the lands in their holdings the appellants as landholders were not entitled to a ryotwari patta and therefore, the annual ryotwari demand in respect of such lands had to be taken as part of the component to determine the basic annual sum under section 31 (1). Learned counsel for the respondents faintly suggested that by reason of the acquisition of the melvaram interest they ceased to be lands in the estate within section 31 (1) but this is an untenable contention which does not merit any consideration. If the lands were not part of the estate, they could certainly not be taken over by the Government, and apart from the contention being without substance, this was not the position taken up by any party at any stage.

We shall now summarise the result of the foregoing discussion. By reason of the acquisition of the melvaram interest the appellants had obtained a share of the melvaram which they retained as a separate interest distinct from their occupancy rights in their holdings. That interest became transferred to and vested in the Government under section 3 (*b*) of the Act. By reason of section 3 (*e*) the appellants were the persons who became entitled to compensation from the Government as provided in the Act. In the computation of the basic annual sum and as part of one of its components the annual ryotwari demand in respect of their holdings had to be taken into account. The logical result of the foregoing analysis would be that the appellants would be entitled to a share in the compensation deposited with the Tribunal.

Learned counsel for the respondents, however, raised two objections to the application of this logical result. The first was based upon the terms of sections 42 to 44 and the second on a question of fact that the compensation actually deposited with the Tribunal was based upon a computation, which did not take into account the ryotwari demand from the holdings in the occupation of the appellants and that consequently the compensation which the Tribunal was called on to apportion among the several claimants did not include that attributable to the interests of the appellants. We shall take up for consideration first the provisions dealing with the powers of the Tribunal in regard to the apportionment of compensation. Section 41 makes provision for the deposit of compensation in respect of each estate and its sub-section (2) enacts :

"On the making of such deposit, the Government shall be deemed to have been completely discharged in respect of all claims to, or enforceable against, the compensation aforesaid."

This is followed by section 42 which enacts :—

"(1) Every person claiming the compensation so deposited or any portion thereof, including the principal or any other landholder, members of his family claiming any portion of such compensation whether by way of a share or by way of maintenance or otherwise, and creditors whether their debts are secured or not, shall apply to the Tribunal within six months from the date on which the amount was so deposited or within such further time as the Tribunal may in its discretion allow".

The section, therefore, is indifferent as to the persons entitled to the compensation but this has to be gathered from the other provisions of the enactment and in particular from section 3 (*e*) and section 41 (2) which we have already extracted. Compensation is for all interests transferred under section 3 (*b*) or extinguished under section 3 (*c*) and it is on the making of such deposit that the Government is discharged in respect of all claims to the compensation. Section 43 enjoins on the Tribunal the duty of serving notice upon all who have applied under section 42 and to any others whom it considers to be interested, before making an enquiry into the validity of the claims received by it and on such enquiry to determine the persons who in its opinion, are entitled to the compensation deposited and the amount to which each of them is entitled. Section 44 was the provision mainly relied on and we shall therefore set out the material portion of it :—

"44 (1).—As a preliminary to such determination, the Tribunal shall apportion the compensation among the principal landholder and any other person whose rights or interests in the estate stand transferred to the Government under section 3, clause (*b*) or cease and determine under section 3, clause (*c*) including persons who are entitled to be maintained from the estate and its income, as

far as possible, in accordance with the value of their respective interests in the estate. (2) The value of those interests shall be ascertained (*a*) in the case of the impartible estates referred to in section 45, in accordance with the provisions contained in that section and in such rules, not inconsistent with that section, as may be made by the Government in this behalf; and

(*b*) in the case of other estates, in accordance with such rules as may be made by the Government in this behalf".

Learned counsel took us through the rules promulgated under section 44 and pointed out that no provision was made in it for the type of interest possessed by the appellants. Learned counsel conceded that if, under section 3 (*e*) and 41 (2) read with section 42 the appellants were entitled to any portion of the compensation amount, the same should not be restricted or abrogated by the rules. But this apart, we do not consider that even under the rules the appellants could not be treated as sharers or owners because though they were not landholders as defined in section 3 (5) they held a landholder's interest or an aliquot part thereof in the estate.

We therefore, hold that the appellants were entitled to a share in the compensation amount deposited with the Tribunal because the amount so deposited with the Tribunal represented in part the compensation for their interests which vested in the Government under section 3 (*b*).

This brings us to the last of the points to be considered, namely, whether the amount now in deposit with the Tribunal and which under the petitions of the appellants and others it was called on to apportion included as a fact the compensation attributable to the melvaram interest of the appellants. This point may be considered from two aspects. The first is whether in fact the Government have taken into consideration the ryotwari demand on the holdings of the appellants in the computation of the basic annual sum under section 31 (1) and (2). If the answer to the above question is in the negative what are the legal rights of the parties and the duty and the jurisdiction of the Tribunal in such an event. The Chairman of the Tribunal recorded his finding in respect of this matter thus :—

"That the melvaram of those lands was not taken into account in arriving at the basic annual sum is clear on a consideration of the documents Exhibits B-10 to B-12, B-15, B-16 and B-61, ... When it is admitted that the rent or melvaram of the lands in which these persons are interested has not been taken into account in determining the basic annual sum, I fail to see how the petitioners can claim any portion of the compensation amount in deposit, which does not represent the lands in which they are interested."

The second member who on behalf of himself and the third member delivered what might be termed the leading judgment on the point, expressed himself somewhat differently. He observed :

"Exhibits B-10 and B-10 (1) account in respect of Kurungalur proper, ... shows the total amount that the landholder is entitled to collect as Rs. 2,078-10-0. Similarly Exhibit B-11 shows that Chidambaram Chettiar was entitled to collect Rs. 691-2-0 for Kurangalur thottam. Exhibit B-12 shows that Ramaswami Chettiar was entitled to collect Rs. 75-7-0 for some of the lands in Kulamangalam. Exhibit B-61 gives the figures for the entire estate and the rentals collectable in respect of all the lands whether they are ryoti lands or whether they are lands both varams of which are held by parties in possession. The total demand is Rs 6,111-1-0 before the rent reduction was effected. The data sheet, Exhibit B-15 shows that before rent reduction, the amount that was taken for calculating the basic annual sum was only Rs. 4,837-9-0. After rent reduction the figures for calculating the basic annual sum is taken to be Rs. 2,949-1-2. This Rs. 2,949-1-2 seems to have been arrived at by taking into account only the melvaram that was being actually collected (*viz.*) from Kulamangalam of Rs. 75-7-0, Kurungalur Rs. 2,077-10-7, Kurangalur thottam Rs. 691-2-0 and Gudalur thottam Rs. 172-6-0 making Rs. 2,916-7-0. . . . Exhibit B-16 is a letter addressed to the advocate from the Director of Settlement and it states: "The counsel for the petitioner is informed that according to the information available in this office Kulamangalam, Kurungalur thottam and Kurangalur for which he has applied for certified copies of data sheets are only hamlets of Kurangalur inam estate. The advance compensation for Kurungalur inam estate has been worked out for the estate as a whole therein. Therefore, there are no separate data sheets for Kurangalur, Kurangalur thottam and Kulamangalam hamlets. The assessments of these hamlets had been taken into account in arriving at the basic annual sum the inam estate of Kurangalur. The amount of Rs. 35,913 deposited towards the advance compensation with the Estates Abolition Tribunal, Madurai, on 11th February, 1953, is in respect of the entire inam estate including the hamlets. . . . . ."

He then proceeded to state :

"Having regard to the figures, I come to the conclusion that in arriving at the basic annual sum and so the advance compensation, these rents have not been taken into account"

and he wound up

"My conclusion, therefore, on the fact is that the rentals have not been included and on the law that is immaterial if they are so included or not in determining the question whether the compensation is divisible among the persons claiming it."

It will thus be seen that there was unanimity between the members of the Tribunal in regard to the question of fact as to whether the amount deposited did or did not include the ryotwari demand on the holdings of the appellant. The question that, however, arises is as to whether the Tribunal could base any decision on this finding. It would be seen that the Second and the Third Members who formed the majority held that in regard to the duties of the Tribunal, in effecting apportionment amoung the claimants of the compensation deposited with them, the components which formed the basic annual sum was not material or relevant. In this conclusion we entirely agree and in fact it appears to us that the duty of the Tribunal is confined to apportioning the amount deposited with them to the persons and among the interests referred to in sections 42 to 46 and does not extend to the determination of the propriety or quantum of compensation deposited by the Government. Section 25 of the Abolition Act enacts that the compensation shall be determined for the estate as a whole and not separately for each of the interests therein and that was precisely what was contained in a communication from the Director of Settlements to the advocate for the parties the material portion of which we have already extracted. The Tribunal had, therefore, to proceed on the basis that the sum deposited with them was the compensation for the entirety of interests in the estate—the entirety of the compensation payable in respect of the rights transferred under clause (*b*) or had ceased and determined under clause (*iii*) ; *Vide* section 3 (*e*). If any of the parties or classes of interests entitled to compensation or any share therein were aggrieved by the quantum of compensation deposited with the Tribunal the authority vested with jurisdiction to determine the matter was not the Tribunal when making apportionment under sections 42 to 46 but the authority named in section 39 (5) which enacts :

"Any person deeming himself aggrieved by an order made under sub-section (1) may, within three months from the date of the order or such further time as the Board may in its discretion allow, appeal to the Board of Revenue ; and the Board shall, after giving the applicant a reasonable opportunity of being heard, pass such orders on the appeal as it thinks fit."

It is in view of these provisions that we have expressed our concurrence with the conclusion of the second and the third members that if the appellants were found entitled to a share in the compensation deposited with the Tribunal, the Tribunal was not the forum where any error in the computation of the basic annual sum or of the quantum of compensation could be agitated.

The result is that these appeals have to be allowed and the petitions remanded to the Tribunal for reapportionment of the compensation in the light of our decision that the appellants are entitled to a share in the compensation by virtue of their acquisition of the melvaram interest in their holdings.

If the parties are aggrieved by any error in the computation of the basic annual sum they would be free to pursue their remedies under the law to obtain a rectification of the error, if any. The appellants are entitled to their costs in these appeals. Counsel's fee Rs. 500 in all the appeals. It will be apportioned equally in the several appeals.

V.S. *Appeals allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE BALAKRISHNA AYYAR.

S. V. Thiruvengadaswami Iyengar .. *Petitioner**

v.

Commissioner, Hindu Religious and Charitable Endowments, Madras .. *Respondent.*

Madras Hindu Religious and Charitable Endowments Act (*XIX of* 1951), *section* 62 (1) (*ii*)—*Right of suit within* 90 *days to set aside an order—Period how computed—Order—Meaning of.*

The word ' order ' in section 62 of the Madras Hindu Religious and Charitable Endowments Act, 1951, means as in any other case of judicial order, the whole of the order passed and not merely the last sentence of it. Where the Commissioner under the Act passed an order merely stating "the appeal be and is hereby dismissed " and calls the reasons for the order as Annexure, the Annexure is an integral part of the order. The date of receipt of the order contemplated by section 62 (1) (*ii*) of the Act is therefore the date of receipt of the entire order including the so-called annexure and not merely the last sentence of the order. The aggrieved party has a right to file the suit within 90 days of his obtaining a copy of the entire order if the same is not communicated to him. Where however a suit has been filed on receipt of the formal order alone to avoid objections as to limitation, it will be open to the plaintiff to amend the plaint after receiving the reasons for the order—the so-called Annexure. The fact that there is no provision in the rules under the Act to furnish free copy of the order or to exclude the time taken to obtain a copy of the order, makes no difference as the "order" contemplated by the provision is to be the whole order of which the formal portion and the Annexure form an integral part.

Petition under section 115 of Act V of 1908, praying the High Court to revise the Order of the Court of the Subordinate Judge, Tanjore, dated 3rd September, 1957 and made in I.A. No. 59 of 1957 in O.S. No. 2 of 1957 on its file.

V. N. Venkatavaradachari, for Petitioner.

The Government Pleader (*B. V. Viswanatha Ayyar*) for Respondent.

The Court delivered the following

JUDGMENT.—The petitioner applied to the Deputy Commissioner for Hindu Religious and Charitable Endowments, Tanjore, for a declaration that he is the hereditary trustee of Sri Venkatachalapathiswami Temple in Serangulam Village. That application was dismissed. The petitioner then appealed to the Commissioner. On 25th September, 1956, the Commissioner passed an order, dismissing that appeal. That order is, so to speak, in two parts. What I may call the first part begins with the usual preamble that prefaces orders of the kind and ends with the following words : " The appeal be and is hereby dismissed ". What I may call the second part of the order sets out the reasons for the direction given in the first part. I may mention here that what I called the second part purports to be and describes itself as an Annexure to what I called the first part. Normally, an Annexure would be an intergral part of the order in the same manner as an Appendix is part of a book and a Schedule is part of a document or statute. The first part of the order appears to have been sent by registered post and received by the counsel for the petitioner on 4th October, 1956. Under clause (*ii*) of sub-section (1) of section 62 of the Act the applicant has a right " within 90 days from the date of the receipt of such order by him" (to) institute a suit in the Court against such order. On 24th December, 1956, the petitioner filed a suit in the Court of the Subordinate Judge, Tanjore, to set aside the order that the Commissioner had passed.

The petitioner applied for and obtained a copy of the "Annexure " some time in January, 1957. On 21st January, 1957, he applied for leave to amend the plaint by adding certain paragraphs. By his amendment, he sought to show that four of the grounds on which the Commissioner rested his decision are erroneous. The Commissioner filed a counter, taking *inter alia* the point that the amendment, if allowed, would take away the plea of limitation open to him. Another point taken was that fresh grounds were sought to be included in the plaint. The learned

*C.R.P. No. 1448 of 1957. 20th January, 1958.

Subordinate Judge dismissed this application for amendment. The petitioner has therefore come to this Court.

As I said before, clause (*ii*) of sub-section (1) of section 62 gives a person aggrieved by certain orders passed by the Commissioner the right to file a suit within 90 days from the date of the receipt by him of the order he complains of. Ordinarily, when we speak of the order of a Court, Tribunal or other similar authority, we mean the whole of the order and not merely the last sentence of it. Thus, for example, an order of a Magistrate discharging an accused person would be the whole of the order ; an order of a Rent Court directing eviction would be the whole of the order including the reasons therefor ; and an order of a Court appointing receiver would include the reasons therefor. There is no reason why the word ' order ' in section 62 should be differently construed. On the other hand, there are considerations which show that it is the only proper why of construing that word. Anybody who is familiar with legal procedure knows that it is impossible to draft a plaint challenging an order made by the Commissioner if he is given merely what I called the first part of the order. Before a proper plaint can be prepared, what is called the Annexure to the order must be available to the legal adviser of the party. It has to be borne in mind that there is no provision in the Act, whereunder the time required to obtain copies of the order complained of can be excluded. When therefore the statute says that the suit should be filed within 90 days from the date of the receipt of the order and at the same time does not provide for the exclusion of the time requisite to obtain the copy of the order, one must conclude that the order referred to in the section, is the order, after obtaining which alone a party can properly take legal advice and set the law in motion. Otherwise, one is forced back to the absurd hypothesis that the Legislature was enacting a futility. I would repeat that what I called the second part of the order calls itself an Annexure, which necessarily means that the two together form one integral whole.

The learned Government Pleader strongly argued that, under the rules framed under the Act, the petitioner is not entitled to a free copy of what has been called the Annexure, and that, in consequence, there is no question of sending it. It may be that, under the rules, a party is not entitled to a free copy of Annexure. But, from that, it does not follow that the Annexure is not a part of the order. It merely means that the rules were drafted on an imprefect understanding of the statute. It seems to me that a person in the position of the petitioner is entitled to 90 days from the date of the receipt of the complete order to institute a suit.

On the merits of the case, I would observe that the amendment should have been allowed. No new ground was really sought to be taken by the amendment; the petitioner sought only to canvass the reasons given by the Commissioner in his order.

This Revision Petition is allowed with costs in both the Courts.

R.M. *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE SUBRAHMANYAM.

Nagammal ... *Petitioner**

v.

C. R. Govindarajulu Naicker ... *Respondent.*

Madras City Tenants Protection Act (VI of 1921), sections 7-A, 8 and 9 and Amending Act (XIX of 1955), section 10 (1)—Effect of amendment on decrees in ejectment which have not been executed—Tenant—When can take advantage of the Act—Rule of limitation—Delay—If could be excused—Fair rent—When could be determined.

It is no doubt true that the benefits of section 9 of the Madras City Tenants Protection Act as amended by Act XIX of 1955 have been made applicable to even cases of tenancy wherein a decree in ejectment has been passed, but has not been executed before the coming into force of the Amending

* C.R.P. Nos. 525, 1079 and 1080 of 1957. 15th November, 1957.

Act. But a tenant who seeks to take advantage of the amending provisions has to apply under section 9 of the Act within one month of the coming into force of the Amending Act for a direction that the landlord should sell the land to him. This is a rule of limitation which cannot be relieved against by the Court in the absence of any express provision in the Act.

An application for fixation of a reasonable rent under section 7-A of the Act can be made only by a tenant who has a right to continue in occupation of the land and not by a person against whom an order for eviction has been made.

Petitions under section 115 of Act V of 1908, praying the High Court to review the Order of the Third Judge of the Court of Small Causes, Madras, dated 16th January, 1957 and made in M.P. Nos. 2083, 2084 and 2082 of 1956 respectively in Ejectment Suit No. 235 of 1953.

K. Srinivasan and *K. Shanmugham*, for Petitioner.

G. T. Ramanujachari, for Respondent.

The Court delivered the following

JUDGMENT.—These Civil Revision Petitions arise out of the orders passed by the Third Judge, Court of Small Causes, Madras, in M.P. Nos. 2082 to 2084 of 1956 in Ejectment Suit No. 235 of 1953 on his file. The suit was instituted by the landlord against the tenant of a parcel of land in Komaleeswaranpet. An order for ejectment was passed in the suit on 9th September, 1953. The tenant was given two months' time for surrendering vacant possession. The tenant then instituted O.S. No. 1948 of 1953 on the file of the City Civil Court, Madras, for a declaration that the landlord was not entitled to an order for eviction. That suit was instituted under section 47 of the Presidency Small Cause Courts Act. The suit was dismissed on 27th January, 1955. The appeal preferred by the tenant against the decree dismissing the suit was transferred by this Court to the City Civil Court and has been dismissed by the City Civil Court on 26th April, 1957.

When the landlord obtained the decree for eviction against the tenant, the tenant was not entitled to the benefits of the Madras City Tenants Protection Act. The Act was amended in 1955 so as to have its benefits extended to tenants in the position of the tenant with whom we are concerned in these petitions. In September, 1956, the tenant filed three petitions under the amended City Tenants Protection Act, in Ejectment Suit No. 235 of 1953. In M.P. No. 2082 of 1956, the tenant prayed for an order directing the landlord to sell the land to the tenant for a price to be fixed by the Court. In M.P. No. 2084 of 1956, the tenant prayed that an order be passed against the landlord directing him to pay compensation for the superstructure which the tenant had built on the land. In M P. No. 2083 of 1956, the tenant prayed that fair rent be fixed under section 7-A of the Madras City Tenants Protection Act. In M.P. No. 2082 of 1956, the Judge of the Small Causes Court was of the opinion that the tenant was not entitled to an order that the landlord be directed to sell the land and dismissed that application. In M.P. No. 2084 of 1956, the learned Judge was of the opinion that the tenant was not entitled to an order for compensation and on that finding dismissed that petition. In M.P. No. 2083 of 1956, the learned Judge took the view that the tenant was entitled to an order fixing fair rent. The tenant has filed C.R. P. Nos. 1080 and 1079 of 1957 against the orders passed in M.P. Nos. 2082 and 2084 of 1956 and the landlord has filed C.R.P. No. 525 of 1957 against the order passed by the learned Judge in M.P. No. 2083 of 1956 on his file.

I shall first deal with the application by the tenant for an order that the landlord be directed to sell the land for a price to be fixed by the Court. When the application was filed, a decree for ejectment has been passed against the tenant. An application for an order that the landlord be directed to sell the land has to be made under section 9 of the Madras City Tenants Protection Act. Section 10 (1), as amended by the amending Act of 1955, enacts that section 9 shall apply to suits in which decrees for ejectment have been passed but have not been executed before the coming into force of the amending Act. Section 9 thus became applicable to the tenant with whom we are concerned in these petitions. But under section 9, an appli-

cation for an order that the landlord be directed to sell the land had to be made within one month after the coming into force of amending Act of 1955. The tenant's application, M.P. No. 2082 of 1956, had not been made within that period of one month. The learned Advocate for the tenant states that the rule that the application should be made within one month is a mere rule of pleading which need not be enforced, if the judge to whom the application is made, thinks that, in the particular case, enforcement of the rule would work hardship or injustice. I hold that the rule is a rule of limitation, which the Court does not have power to relieve a person against, in the absence of express jurisdiction conferred on the Court to grant such relief for sufficient cause. No such jurisdiction is conferred on the Court to extend the time for applying for relief under section 9. The learned Judge's order dismissing M.P. No. 2082 of 1956 is correct and C. R. P. No. 1080 of 1957 is dismissed with costs.

The next application we have to deal with is the application made by the tenant for compensation for the superstructure which he had constructed on the land. In the ejectment proceedings, the tenant had pleaded that he was entitled to compensation. That claim was gone into and the judge gave a finding that the tenant was not entitled to compensation. But the law which was applied to that claim was the general law of contracts and tenancy and not the general law as modified by sections 3, 4, 10 and 12 of the Madras City Tenants Protection Act. The claim made by the tenant subsequent to the Amending Act of 1955 had to be decided with reference to these sections. The learned Small Cause Judge was wrong in his view that the tenant's claim was barred by *res judicata* by reason of the order that had been made in Ejectment Suit No. 235 of 1953. C.R.P. No. 1079 of 1957 is allowed and the order in M.P. No. 2084 of 1956 is set aside. The learned Judge will restore the petition to its original number on his file and will dispose of it afresh with reference to the rights if any, allowable under sections 3, 4, 10 and 12 of the Madras City Tenants Protection Act. The parties will be free to adduce evidence in relation to their respective contentions of that claim of the tenant. Costs in this revision petition will abide and be provided for in the order to be passed by the Judge of the Small Causes Court.

The last application we have to deal with is M.P. No. 2083 of 1956 in which the tenant prayed that fair rent be fixed. That application was made under section 7-A of the City Tenants Protection Act. Section 8 of the Act makes it clear that an order under section 7-A could be passed only in a case where the tenant might, in law, be entitled to continue in possession. Where an order for eviction has been made, the tenant would not be entitled to continue in possession and, therefore, would not ordinarily be entitled to an order fixing fair rent under section 7-A. In this case, if the tenant's claim to compensation be rejected, the landlord would be entitled to immediate possession and, therefore, the tenant would not be entitled to an order fixing fair rent. On the other hand, if the tenant's claim for compensation is allowed and the landlord does not pay such compensation immediately, with the result that by the operation of section 4 of the Madras City Tenants Protection Act, the tenancy continues, then the tenant would become entitled to an order fixing fair rent. C.R.P. No. 525 of 1957 is allowed and the order in M.P. No. 2083 of 1956 is set aside. The learned Judge will pass orders in that petition in the light of the observations made above. The costs in this revision petition also will abide and be provided for in the order to be passed by the Judge of the Court of Small Causes.

Mr. G. T. Ramanujachari, for the tenant, states that the amount directed by this Court to be paid before 26th October, 1957, will be paid within a month from this date.

R.M. *C.R.P. No.* 1080 *of* 1957 *dismissed.*
C.R.P. No. 1079 *of* 1957 *and*
C.R.P. No. 525 *of* 1957 *allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. P. RAJAGOPALAN, *Officiating Chief Justice* AND MR. JUSTICE BASHEER AHMED SAYEED.

A. Sundararamanujulu Naidu (*dead*) and another .. *Appellants**

v.

Kamalammal and others .. *Respondents.*

Deed—Construction—Gift of property equally in favour of two or more persons with a gift over to the descendants of one of them —Gift over—When will take effect—Death of one of the beneficiaries—Rights of the surviving beneficiaries—Theory of cross-remainder.

Where there is a gift equally between two or more persons during their respective lives and after their death the whole property is given over to the descendants of one of them the Court will presume that the testator's intention was that after the death of one of the original beneficiaries the survivor or survivors will be entitled to the whole of the income during their lifetime down to the period of distribution. The gift over to the descendants of one of the beneficiaries will come into operation, only after the death of all the original beneficiaries the principle of construction being that the original beneficiaries took the properties as tenants-in-common for life with a like life interest in remainder to the survivor or survivors on the death of one of them. The Court would imply in such cases a cross-remainder for life between the beneficiaries.

Hobson In re: *Barwick* v. *Holt*, L.R. (1912) 1 Ch.D. 626; *Stanley's Settlement*, In re : *Maddocks* v. *Andrews*, L.R. (1916) 2 Ch.D. 50 ; *Lalta Baksh Singh* v. *Phool Chand*, (1945) 2 M.L.J. 393 (P.C.) and *Chandra Mohan* v. *Sanbala Dasi*, A.I.R. 1922 Pat. 68, referred.

On appeal from the Judgment and Decree of the Hon'ble Mr. Justice Balakrishna Ayyar, dated 9th January, 1952 and passed in the exercise of the Ordinary Original Civil Jurisdiction of the High Court in C.S. No. 685 of-1948.

N. K. Mohanarangam Pillai and *N. K. Pattabhiraman*, for Appellants.

K. Tiruvenkatachari and *V. Nagabushanam*, for Respondents.

The Judgment of the Court was delivered by

Rajagopalan, O.C.J.—The second plaintiff is the son of the first plaintiff. The first plaintiff was Venkatakrishnama Naidu's sister's son. Venkatakrishnama had no childeren of his own. The first defendant is the foster daughter of Venkatakrishnama, and the second defendant is her husband. They also lived with Venkatakrishnama in his house, No. 32, General Muthiah Mudali Street. On 1st December, 1943, Venkatakrishnama executed a deed of settlement, Exhibit P-1. He reserved a life interest in the house, the only piece of property dealt with under Exhibit P-1, for himself, after which it was to go to plaintiffs 1 and 2 for their life with a gift over to the descendants of the second plaintiff. Exhibit P-1 also provided for the payment of Rs. 25 a month by plaintiffs 1 and 2 to the first defendant, the foster daughter of Venkatakrishnama. It further directed the " beneficiaries ", as plaintiffs 1 and 2 were styled, to perform every year at a cost of about Rs. 50 the Sri Alamelumanga Thayaramma Garudotsavam in the Bairagimadam Temple, Madras.

On 14th December, 1944, Venkatakrishnama executed Exhibit P-2 under which he purported to revoke the settlement effected under Exhibit P-1. It may not be necessary to refer to all the recitals or even to all the dispositions made under Exhibit P-2 except that defendant 5 was appointed a trustee and that in addition to the first defendant whose monthly allowance was reduced to Rs. 20, the second plaintiff defendant 2, defendant 3, defendant 4 and defendant 5 were to receive for their lives specified shares in the balance of the income from the house. Venkatakrishnama informed the plaintiff of the revocation of Exhibit P-1 and the execution of Exhibit P-2 in January, 1945, but they immediately repudiated his right to revoke Exhibit P-1. Venkatakrishnama died in January, 1948.

Shortly after the death of Venkatakrishnama, the plaintiffs instituted the suit, out of which this appeal arose for recovery of possession of the house from the defendants basing their claim on Exhibit P-1. That claim was resisted by defendants

*O.S. Appeal No. 123 of 1953. 17th December, 1957.

1 and 2. They pleaded that, as the execution of Exhibit P-1 was vitiated by the exercise of undue influence, no rights could be based upon Exhibit P-1 and that Exhibit P-2 therefore should prevail. Alternatively the defendants pleaded that even if Exhibit P-1 was not voidable, the plaintiffs were estopped from claiming any rights under Exhibit P-1. Exhibit P-1 had directed plaintiffs 1 and 2 to discharge the encumbrances which they did. But the plaintiffs reimbursed themselves by accepting a promissory note from Venkatakrishnama on 9th January, 1947. Balakrishna Ayyar, J., who tried the suit, rejected the plea of undue influence as unproved, and he held that Venkatakrishnama was not entitled to revoke Exhibit P-1, and that Exhibit P-2 did not therefore prevail as against Exhibit P-1. The learned Judge found that the first plaintiff had accepted from Venkatakrishnama the promissory note, dated 9th January, 1947, and that the effect of that transaction was that the first plaintiff released his rights under Exhibit P-1 in favour of Venkatakrishnama. The learned Judge held that that did not affect the rights of the second plaintiff under Exhibit P-1 and summed up :

"In the result there will be a decree declaring that the second plaintiff is entitled in respect of one half of the suit property to an interest limited and defined by the terms of Exhibit P-1 and subject thereto giving him joint possession with the defendants."

The relief granted to the second plaintiff was thus explained by the learned Judge :

"It is only on the death of the first plaintiff that the interest created in his favour by Exhibit P-1 would pass to the second plaintiff. The life estate of the first plaintiff would as a consequence of the release go back to the settlor and not having been disposed of by him would go to his heirs. The position therefore is that the first plaintiff is not entitled to the property while the second plaintiff is entitled to possession of only one half".

The plaintiffs appealed against the judgment of Balakrishna Ayyar, J. During the pendency of that appeal the first plaintiff died.

The main contention of the learned counsel for the appellant before us was that after the death of the first plaintiff the second plaintiff was entitled to a life interest in the whole property under the terms of Exhibit P-1 subject of course to the other conditions imposed by Exhibit P-1.

Though defendants 1 and 2 did not prefer a memorandum of cross objections with reference to the one half in the house, the right to possession of which by the second plaintiff was upheld by the learned Judge, the learned counsel for the defendants respondents sought to sustain the judgment under appeal by putting forward the argument that the learned Judge's finding that the execution of Exhibit P-1 was not vitiated by the exercise of undue influence was incorrect. On merits that argument deserves little consideration. As the learned Judge pointed out though there was evidence to show that before the execution of Exhibit P-1 Venkatakrishnama had run the risk of being prosecuted by the police for preferring a false complaint of theft, there was really no evidence to show that the first plaintiff or the second plaintiff, or both together could have done anything to avoid that prosecution or to use that threat of prosecution for bargaining with Venkatakrishnama for the execution of Exhibit P-1. The learned Judge, in our opinion, rightly found that the execution of Exhibit P-1 was not in any way vitiated and that the settlor Venkatakrishnama was not entitled to revoke Exhibit P-1.

The learned counsel for the appellants did not consider it necessary to challenge the correctness of the finding of the learned Judge, that the first plaintiff accepted a promissory note executed by Venkatakrishnama on 9th January, 1947, which in effect repaid the first plaintiff the monies he had expended in clearing the encumbrances on the house under the directions given in Exhibit P-1. We do not consider it necessary to discuss the legal effect of that transaction. The learned Judge, it should be remembered, held that the legal effect of that transaction was a release by the first plaintiff in favour of Venkatakrishnama of the first plaintiff's rights under Exhibit P-1. Whatever it was that the first plaintiff gave up and whatever be the validity of the transaction characterised as a release, that did not affect the interests of the second plaintiff ; nor could it affect the second plaintiff's rights in the property

after the lifetime of the first plaintiff. Those rights of the second plaintiff have to be determined only on the basis of Exhibit P-1.

In Exhibit P-1 plaintiffs 1 and 2 were designated the beneficiaries. The relevant portion of Exhibit P-1 ran :

"The settlor hereby reserves a life interest for himself in the said immovable property. . . . the settlor hereby grant, convey and assign unto the said beneficiaries subject to the said life interest of the settlor in the said immovable property and subject to the terms and conditions hereinafter mentioned. . . . . all the right, title and interest. . . . . to be hereby granted and conveyed and assigned unto the use of the said beneficiaries for their lifetime, with remainder absolutely to the use of the son or sons of the second of the beneficiaries abovenamed severally and in equal shares. . . . . and in case the immediately foregoing limitation should not take effect at the death of the beneficiaries above named with remainder absolutely to the use of the daughter or daughters of the second of the beneficiaries abovenamed severally and in equal shares with absolute powers of enjoyment and disposition. . . . . and in case neither of the two immediately preceding limitations should take effect at the death of the beneficiaries abovenamed, the said immovable property hereby conveyed and assigned shall be taken absolutely by the second of the beneficiaries himself."

Balakrishna Ayyar, J., held :

"Though Exhibit P-1 does not in express terms say that the interest created in favour of the first and second plaintiffs is a joint interest, one may infer regard being had to the relationship between the first and the second plaintiffs and the ordinary notions of a Hindu, that Venkatakrishnama Naidu intended to give them a joint estate."

Though we have reached the same conclusion, that on the death of the first plaintiff the second plaintiff became entitled to a life interest in the whole house, that conclusion cannot be based on any presumption of joint tenancy. It should be taken as well-settled now that no such presumption prevails in India. An inference can be drawn that the settlor intended to and did create a joint tenancy but that inference must be based primarily on the terms of the deed of settlement, in this case Exhibit P-1.

We have already set out the relevant terms of Exhibit P-1. The grant was to both the beneficiaries, the first and second plaintiffs. The rule of construction applicable to similar grants was thus summed up in Theobald on the Law of Wills, Eleventh Edition at page 436 :

"Where there is a gift equally between *A*, *B* and *C* during their respective lives and after the death of the survivor of them the whole property is given over, the Court has implied an intention on the part of the testator that the survivors or survivor of *A*, *B* and *C* shall after the death of one or more of them be entitled to the whole income down to the period of distribution. This result is reached either by treating, *A*, *B* and *C* as joint tenants, rejecting words importing a tenancy in common ; or by implying cross-remainders for life between them ; the latter theory is preferred in the modern cases."

Hobson, In re: *Barwick* v. *Holt*[1] and *Stanley's Settlement*, In re : *Maddocks* v. *Andrews*[2], support that statement of law.

At page 631 of the report in *Hobson*, In re: *Barwick* v. *Holt*[1], Parker, J., said.

"In my opinion it is quite clear on the authorities that where there is a gift equally between *A*, *B* and *C* during their respective lives and after the death of the survivor of them the whole property is given over, the Court has implied an intention on the part of the testator that the survivors or survivor of *A*, *B* and *C* shall after the death of one or more of them be entitled to the whole income down to the period of distribution, and that conclusion appears to have been arrived at in one of two ways. In the first place and in the earlier cases the Judges have said that a gift in equal shares during their respective lives only *prima facie* creates a tenancy in common, and that, if the Court can gather an intention on the face of the will that the tenancy was intended to be not a tenancy-in-common but a joint tenancy, it will treat the words "in equal shares" or other similar words as not destructive of what would otherwise be a joint tenancy ; and that interpretation is one which would in the ordinary course lead to the desired effect. On the death of *A*, for instance, *B* and *C* would continue to be joint tenants of the whole, and on the death of *B*, *C* again would become tenant of the whole. That is one way of meeting the difficulty. . . . . . .; but in other cases the rule has been rested on different grounds in this way. It has been said that where there is a gift to *A*, *B* and *C* equally during their respective lives, and after the death of the survivor over, an intention is manifested that *A*, *B* and *C* or such of them as shall be living for the time being, shall enjoy the property down to the period of distribution and, that the best way of effecting that intention is to imply a gift over on the death

1. L.R. (1912) 1 Ch.D. 626.

2. L.R. (1916) 2 Ch. D. 50.

of any of them of his or her share as well original as accruing to the survivors or survivor; and some of the cases have, I think, been decided on what I may describe as a mixture of those two theories."

The head note in *Stanley's Settlement*, In re: *Maddocks* v. *Andrews*[1], runs :

"In 1860 *S* (Stanley) by deed settled leasehold property of his own in trust for his daughters *M* (Mrs. Morgans) and *R* (Mrs. Rees) for and during the terms of their natural lives as tenants-in-common and not as joint tenants and from and immediately after the decease of the survivor of them . . . . . then to the use of their respective child or children of the said *M* and *R* share and share alike as tenants-in-common and not as joint tenants.

M died in 1867 leaving children, *R* died in 1914 without having had a child :—

Held that, on the death of *M*, *R* took a life estate by implication in the moiety of *M* and that on the death of *R* the children of *M* took the whole of the settled property".

Sargant, J., observed at page 55 ;

"Then is there enough in the deed before me from which to imply a life interest to Mrs. Rees ? Mrs. Morgans had four children and died many years ago. Mrs. Rees never had any child and died in 1914. In my opinion, it is right to hold that Mrs. Rees took a life interest in her sister's share on that sister's death not on the ground that there was a joint tenancy, because that is expressly excluded, but following the rule of construction laid down on the other and as I think better view of the principle on which in *Armstrong* v. *Eldridge*[2]; *Pearce* v. *Edmeades*[3] and In re *Richerson*[4], were decided, namely, that a life interest is to be implied in favour of the survivor of the tenants-in-common. It is better to say that they are tenants-in-common for life with a life interest in remainder to the survivor. . . It is sufficient to say that there is enough on the will to enable me to hold that each sister took a life estate in remainder in the other sister's share on that sister's death".

No doubt in addition to the specific provision that Mrs. Morgans and Mrs. Rees should take their interest as tenants-in-common, there was also a specific provision in that case for the gift over to operate on the death of the survivor of the two beneficiaries, Mrs. Morgans and Mrs. Rees. But the latter provision made no real difference to the principle enunciated by the learned Judge in inferring on the terms of the deed a provision for what has been termed a cross-remainder, which was what the learned Judge explained, that each sister took a life estate in remainder in the other sister's share on that sister's death.

It was the same principle of cross-remainder that was applied at least as an alternative basis by their Lordships of the Privy Council in *Lalta Baksh Singh* v. *Phool Chand*[5]. At page 398 is the observation :—

"It is true that no express provision has been made by the testator for the junior widow, but their Lordships feel no doubt that she takes an interest for her life whether by implication under the death will as the High Court thought or under the Hindu Law, it is not necessary to determine."

Their Lorships pointed out that when after the death of the senior widow, the junior widow remained in possession of the entire property, it was quite in accordance with the intention and wishes of the testator as expressed in the will.

In *Chandra Mohan* v. *Sasibala Dasi*[6], the document provided :

" . . . . . Srimati Sunayana Dasi and the widow of late Prasanna Kumar Dutta will take into possession the lands of Schedule KHA for maintenance for life. . . . After the death of both of them the plaintiff will take possession of the lands. . . . . ."

Coutts, J., observed :

"It appears to me that there can be no doubt as to the construction of this term of the compromise. It is clearly a grant of this land to the two ladies for life as maintenance, that is to say, they are joint tenants of the property and even on the first sentence of this portion of the compromise alone I would be prepared to hold that the plaintiff was not entitled to recover possession until the death of both the ladies.

But if there were any doubt that doubt is set at rest by the last sentence: "After the death of both of them the plaintiff will take possession of the lands." This is a clear statement that it is only after the death of both ladies that the plaintiff will get possession and in my view there can be no possible ambiguity."

From the terms of Exhibit P-1 which we have set out above it seems clear to us that the settlor intended the gift over to the descendants of the second plaintiff to

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1. L.R. (1916) 2 Ch. D. 50.
2. (1791) 3 Bro. C.C. 215.
3. 3 Yavdc Ex. 246.
4. L.R. (1893) 3 Ch. 146.
5. (1945) 2 M.L.J. 393 (P.C.)
6. A.I.R. 1922 Pat. 68.

operate only after the death of both the beneficiaries, the first plaintiff and the second plaintiff. That was made even clearer by the provision that the second beneficiary, the second plaintiff, should take an absolute interest in the property if he had no children at all, sons or daughters. We are not of course concerned now in this case with the question, at what point of time the life interest of the second plaintiff becomes enlarged into an absolute interest in the property under the terms of Exhibit P-1. We have referred to that provision only to gather what the settlor provided should happen when one of the beneficiaries died. In our opinion the claim of the second plaintiff that he took a life interest in the whole of the property on the death of the first plaintiff should be sustained on the application of the principle of cross-remainder. The deed of settlement by necessary implication granted such a life interest in favour of the survivor of the two beneficiaries, plaintiffs 1 and 2. That would be the principle to apply even on the assumption, that in the absence of any express words in Exhibit P-1 the first and second plaintiffs were only tenants-in-common. The settlor by necessary implication granted a life interest in the whole of the property in favour of the survivor of the tenant-in-common. To adapt the words of Sargant, J., on the terms of Exhibit P-1 it should be more proper to hold that the first plaintiff and the second plaintiff were tenants-in-common for life with a life interest in remainder to the suvivor, or in other words, the second plaintiff took a life estate in remainder in the first plaintiff's share on the death of the first plaintiff.

The learned counsel for the respondents urged that even if a joint tenancy was created as between the first and second plaintiffs by the terms of Exhibit P-1 that was put an end to when the first plaintiff released his rights in favour of the settlor, and that that interest did not survive to the second plaintiff on the death of the first plaintiff. It may not be necessary to canvass the correctness of this contention, because we have declined to hold that it was joint tenancy that was created under the terms of Exhibit P-1. The learned counsel for the respondents referred to *Ammani Ammal* v. *Periasami Udayan*[1]. We are unable to see anything in it to support the contention of the learned counsel for the respondents. If anything it militates against the acceptance of the view put forward by the learned counsel. But, as we have pointed out, it may not be necessary to pursue the matter further because the basis of the argument was that a joint tenancy had been created by Exhibit P-1 and that contention we have not accepted.

The determination of the main question in the appeal turned on an event that was subsequent to the institution of the appeal. The first plaintiff died during the pendency of the appeal. The second plaintiff is certainly entitled to be granted relief at this stage after taking into account that subsequent event. As we have held that the second plaintiff was entitled to a life interest in the whole house after the death of the first plaintiff, the decree under appeal will have to be modified and the second plaintiff will have to be granted a decree entitling him to possession of the whole of the property.

Balakrishna Ayyar, J., directed each side to bear its costs, and there is no justification to interfere with that direction. Since the apeal itself had to be decided on the basis of an event subsequent to the institution of the appeal, we consider that the appropriate course would be to direct the parties to the appeal to bear their respective costs.

The appeal is allowed.

Then there is the question of mesne profits. The learned Judge did not give any directions. But then it should be remembered that the question of mesne profits is normally reserved for adjudication in proceedings after the decree.

Since we did not go into the question whether it was Venkatakrishnama's heirs or of the first plaintiff that was entitled to possession of one half of the house, it may not be possible to grant any direction with reference to mesne profits calculated

1. (1923) 45 M.L.J. 1.

with reference to one half of the house up to the death of the first plaintiff. We have held that the second plaintiff was entitled to possession of the whole house from the date of the death of the first plaintiff. From that date and on that basis the defendants in possession will be liable to pay mesne profits to the second plaintiff. Under the terms of the decree of Balakrishna Ayyar, J., the second plaintiff was found entitled to one half of the house, and the defendants will be liable for mesne profits for that one half of the house from the date of this suit and up to the date of the death of the first plaintiff, the liability to be ascertained and enforced in the usual course.

R.M. *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. P. V. RAJAMANNAR, *Chief Justice* AND MR. JUSTICE PANCHAPAKESA AYYAR.

Messrs. General Papers Limited .. *Appellant**

v.

Messrs. A.P.A. Pakkir Mohideen and Brothers ... *Respondents.*

Sale of Goods Act (III of 1930), section 23—Property in unascertained goods—When would pass—Intention of parties to the contract.

Civil Procedure Code (V of 1908), section 20 (c)—Cause of action at a place where money under the contract was payable—Jurisdiction.

The contract to supply the goods was entered into at Madras and the goods were to be despatched by railway to the Sattur Railway Station and the entire price and charges were to be paid by the buyers at Tenkasi to the Bank to whom the railway receipt was sent by the sellers consigning the goods to self and not to the buyers. The orders were placed at Madras after inspection and approval of the goods but without separating the goods covered by the contract from the general stock. The goods were destroyed by fire during transit and on the question whether the property in the goods had passed to the buyers,

Held: The sellers did not take out the goods contracted for from the general stock with them and put them into any cart or box sent by the buyers, when alone the appropriation with the implied assent of the buyer would be made out and property pass. An inspection of the general stock and approval of the quality of the goods and fixation of the price and agreement regarding payments of freight, sales tax, and packing charges will not do to pass property to the buyers, if the goods were not separated from the general stock.

Though payment of price is not a condition precedent to the passing of the property in the goods yet if there was no express or implied assent of the buyer when the appropriation was made by the seller at his godown of the particular goods, there would be no passing of property.

By consigning the goods to self and sending the railway receipts to the bank which must in the circumstances be held to be the agent of the sellers, directing the bank to deliver the railway receipts duly endorsed to the buyers, after the buyers had paid the money, the sellers had reserved the right of disposal over the goods and they were still the owners of the goods.

Each case has to be decided on its own facts, regard being had to the intention of the parties, under the particular contract as to passing of the property in the goods.

Though the contract was made at Madras and the defendants were not living within the jurisdiction of the Court of the Subordinate Judge of Tirunelveli and the goods were to be delivered at a place outside the jurisdiction of that Court, the Subordinate Judge's Court had still jurisdiction to try the suit as part of the cause of action, namely, the place where the money under the contract was payable, was within its jurisdiction.

Case-law discussed.

Appeal preferred to the High Court against the Decree of the Court of the Subordinate Judge of Tirunelveli, dated 31st December, 1951 and passed in Original Suit No. 43 of 1951.

R. Gopalaswami Ayyangar, D. Narasaraju, T. T. Srinivasan and *A. N. Rangaswami*, for Appellant.

K. Bhashyam and *K. Venkateswaran*, for Respondents.

*Appeal No. 635 of 1952. 28th November, 1956.

The Judgment of the Court was delivered by

Panchapakesa Iyer, J.—This is an appeal by the General Papers Limited, Madras, defendants in O.S. No. 43 of 1951 on the file of the Principal Subordinate Judge of Tirunelveli, against the judgment and decree therein.

That was a suit filed against them by one Pakir Mohideen and others of Kadianallur for recovering from them Rs. 6,781-12-0 with subsequent interests and costs. The story of the plaintiffs was briefly this.

On 1st March, 1950, the plaintiffs' agent, Annamalai Nadar, placed an order Exhibit B-1 with the defendants for 7 bales 308 reams of imitation glassine paper worth Rs. 4,499-11-0. On 6th March, 1950, he placed an order for 3 bales of coloured transparent paper worth Rs. 1,454-11-0, under Exhibit B-2. Both these orders were placed by him after inspecting the stock of such paper with defendants, and approving of their quality but without separating the bales covered by the two contracts from the general stock with the defendants. The prices were ex-godown Madras, and the goods were to be despatched by railway to Sattur Railway Station. The packing and forwarding charges and sales tax were to be paid extra by the buyers. The entire price and charges were to be paid by the plaintiffs at Tenkasi within the jurisdiction of the lower Court, through the South India Bank, Ltd., The appellants sent both the consignments together by railway to Sattur consigned to self, and not to the plaintiffs, on 7th March, 1950, as per Exhibit A-2. The invoice for the goods came to Rs. 6,058 including the sales tax, forwarding charges and registration charges. The appellants drew a bank draft, Exhibit A-5, in favour of the South India Bank Ltd., Tenkasi, and sent it on 9th March, 1950, along with the railway receipt to the South India Bank with a covering letter Exhibit B-3, requesting the Bank to collect the amount as per the draft from the plaintiffs and deliver the railway receipt to them, duly endorsed in their favour, if they paid the draft amount and the clearing charges and over-due interest, if any, and requesting the bank to remit the proceeds to them, the over-due interest being directed to be charged at 6 per cent per annum. The plaintiffs paid the South India Bank, Tenkasi, Rs. 6,058, as per Exhibit A-2, and another sum of Rs. 6-6-0 towards the bank's commission on 16th March, 1950 and got the railway receipt duly endorsed in their favour by the bank. But when they proceeded to Sattur Railway Station to take delivery of the goods they found that the goods had not arrived there. Ultimately they learned from the appellants that the goods were the subject of a fire accident on 14th March, 1950, in the course of transit, and that the salvaged wreck of the articles was in Tiruchirapalli Goods Station. The appellants learnt this by a letter, Exhibit B-5 dated 11th April, 1950, to them from the Chief Traffic Manager, Tiruchirapalli, and they communicated it to the plaintiffs. They tried to recover the loss from the railway, which however denied its responsibility relying on various things, like inevitable accident, the terms of the risk note signed by the appellants, etc. They then tried to make the plaintiffs approach the railway authorities and claim the damage, and returned the railway receipt to them through the brother of Pakir Mohideen for that purpose. The plaintiffs succeeded no better than the appellants in recovering anything from the railway. So, they filed the suit claiming the amount from the appellants on the ground that the property in the goods consigned had not passed to them but had remained with the appellants at the time the goods were destroyed by fire.

The appellants strenuously contested the suit, mainly on four grounds : (i) that the lower Court had no jurisdiction to try the suit as the contracts were made at Madras and as the appellants were residing outside its jurisdiction, and the goods were to be delivered at Sattur outside the jurisdiction of the lower Court ; (ii) that the property in the goods had passed to the plaintiffs even at Madras itself, the moment the contracts under Exhibits B-1 and B-2 were concluded, as the goods were in a deliverable state and had been inspected and approved by the plaintiff's agent, Annamalai ; (iii) that in any event, the property in the goods had passed to the plaintiffs as soon as the goods were taken out from the stock in the godown and put on the railway for transmission to them ; and (iv) that the plaintiffs had elected to

work out their remedies against the railway and for that purpose had taken back the railway receipt from the appellants, to whom they had given it for recovering the amount from the railway, and so it was not open to the plaintiffs to file this suit thereafter and seek to make the appellants liable therefor. The plaintiffs, of course, strongly opposed all these four grounds urged by the appellants.

The learned Subordinate Judge held on the ground of jurisdiction against the appellants, on the ground that though the contract was entered into at Madras, and the goods had to be delivered at Sattur, and the lower Court had no jurisdiction over Madras or Sattur, the plaintiffs, who were living at Kadianallur within the lower Court's jurisdiction, had chosen to file the suit there and the appellants had acquiesced in that jurisdiction after an initial formal objection to it, and so were estopped from questioning such jurisdiction. He added that though consent could not confer jurisdiction on a Court, still estoppel would operate where the Court had inherent jurisdiction, and when it was only a question of irregular jurisdiction. He found on points 2 and 3 that the goods had to be delivered at Sattur, under the contracts though the word 'despatched' had been used in the place of the word 'delivered', and that the property in the goods had not passed to the plaintiffs on the goods being entrusted to the railway, a common carrier, since they were consigned to self, and the railway receipt was sent to the South Indian Bank, which was instructed to endorse it and hand it over to the plaintiffs, only after they had paid the draft amount as well as the bank's charges and over due interest if any. As this payment to the bank was made, and the railway receipt endorsed to the plaintiffs only on 16th March, 1950, that is two days after the destruction of the goods by fire in transit, he held that the goods at the time of the destruction by the fire accident remained the property of the appellants who had retained control over them despite their entrustment to the carrier and so the loss must fall on the appellants. On the fourth point he held that the appellants had entered into a prolonged correspondence with the railway authorities trying to fix the responsibility for the loss on them, and, while the matter was still undecided, had made the plaintiffs take interest in it, and correspond with the railway administration for the recovery of the loss, and that this would not preclude the plaintiffs from proceeding against the appellants for the loss when they did not recover anything from the railway and it was not alleged that the railway had paid them for the loss. So he decreed the suit with costs. Hence this appeal.

We have perused the entire records and heard Mr. R. Gopalaswami Iyengar, the learned counsel for the appellants, and Mr. K. Bashyam, the learned counsel for the plaintiffs. Mr. Gopalaswami Iyengar urged before us also the same four contentions that were urged by the appellants in the lower Court, and contended that the lower Court had gone wrong in its findings on every one of them. He urged first that the lower Court was wrong in holding that mere acquiescence in its jurisdiction, after vigorously contesting it, would give the lower Court jurisdiction to try the suit when even consent would not give jurisdiction, as stated by the lower Court itself. That is so. But the lower Court had undoubted inherent jurisdiction to try the suit, in the circumstances, as pointed out by Mr. Bashyam, since a part of the cause of action, namely, the fact of the money due under the contracts, having to be paid at Tenkasi, within the jurisdiction of the lower Court, and section 20 (*c*), Civil Procedure Code, conferred jurisdiction on the lower Court. So, though the contract was made at Madras, and the defendants were not living within the jurisdiction of the lower Court, and the goods were to be delivered at Sattur outside the jurisdiction of the lower Court, the lower Court had still jurisdiction to try the suit as part of the cause of action, namely, the place where the money under the contract, was payable, was within its jurisdiction. It was not disputed that the money was actually paid by the plaintiffs to the South India Bank, Tenkasi, on 16th March, 1950, and that the railway receipt in respect of these goods was thereafter endorsed by the bank's agent and handed over to the plaintiffs at Tenkasi. The plaintiff's grievance is that the railway receipt at the time of its being endorsed and handed over to them, was not backed by goods, the goods having been destroyed two days earlier by fire,

That is why they filed the suit to recover the money from the appellants. So there is no doubt whatever that part of the cause of action for the suit arose in Tenkasi, within the jurisdiction of the lower Court, as urged by Mr. Bashyam. So we overrule this contention.

The next was that as the goods covered by the contracts, Exhibits B-1 and B-2, were in a deliverable state, and as the plaintiff's agent Annamalai had inspected and approved of them, they must be deemed to have been unconditionally appropriated to the plaintiffs and to have become their property the moment the contracts were entered into at Madras, or at least when they were separated from the general stock and put in the cart to be taken to the Beach Station at Madras for consignment, and so the plaintiffs ought to have been directed by the lower Court to bear the loss by the fire later on. Mr. Gopalaswami Iyengar relied on the ruling in *Langton* v. *Higgins*,[1] and on the ruling in *Aldridge* v. *Johnson*[2], referred to therein, in support of the above contention. We agree with Mr. Bashyam that those rulings will have no application to the facts of this case. In *Aldridge* v. *Johnson*[2], it was held that the property passed to the buyer when the barley was put into the sacks supplied by the buyer. In *Langton* v. *Higgins*[1], the property was held to have passed to the buyer by the sellers putting the peppermint oil into the bottles supplied by the buyer. With great respect we agree that in those cases the property passed to the buyer by such act. But the sellers in this case did not take out the bales contracted for from the general stock with them, and put them into any cart or box sent by the buyers, when alone the appropriation with the implied assent of the buyer would be made out and property pass. Indeed even in *Firm P.M.R.S.* v. *B.C.J. & Sons*[3], a ruling of the East Punjab High Court relied on by Mr. Gopalaswami Iyengar, it was remarked that where there is a contract for sale of unascertained goods, it is necessary that they should be identified and ascertained before the contract can be performed, and that if the parties agree that the contract goods shall be taken from some specified larger stock, then there is no identification of the goods as contract goods till they are ascertained on severance, and that in this connection a mere notional severance is not sufficient, and that it is well-settled that before property in the goods passes to the buyer, the individuality and identity of the goods to be delivered under the contract should be established. So the mere fact that Annamalai had inspected the general stock and approved of the quality of the paper, and that the price was fixed ex-godown at Madras, and the buyer had to pay the freight, sales tax, packing charges, etc., will not do to pass the property to the buyers, as the contracted bales were not separated from the general stock and given to Annamalai, and therefore the property in the suit bales had not passed at Madras itself to the plaintiffs, the buyers here.

Mr. Gopalaswami Iyengar then relied on the following passage in the judgment of Bishan Narain, J., in the Punjab ruling quoted above :

> "At the time when the goods were removed from the godown there was irrevocable and unconditional appropriation of the goods to the contract and it appears to me that if later on the seller had changed the bales then it would have been in breach of the contract, and if the goods had been destroyed after they had left the godown then the buyers' goods would have been destroyed, and not the sellers' goods."

This too will not help Mr. Gopalaswami Iyengar. It is no doubt true that the payment of the price is not a condition precedent to the passing of the property in the goods. Thus, if a man selects a particular fountain pen and buys it, and leaves it in the shop to go and fetch the price, and the pen is destroyed by fire before he returns, he will have to bear the loss as the pen was appropriated to him irrevocably and had become his property before it was destroyed by fire. But, in the present case, there was no express or implied assent of the buyer when the appropriation was made by the seller, at his godown, of the particular bales towards the contract, and the appellants-sellers cannot rely on section 23 (1) of the Sale of Goods Act but only on section 23 (2).

1. 4 H. & N. 391 (118 Revised Reports 519). 3. A.I.R. 1956 Punj. 217.
2. 110 Revised Reports 875.

The observations of Wadsworth, *Offg. C.J.*, in a Bench decision, *Siddique & Co.* v. *Mysore Textile Agencies*[1], to which one of us was a party, at page 251, will apply to all cases like these. Those observations are to the following effect :

"Having regard to the terms of section 23 (2) of the Act it must, we think, be held that the sale would be completed by the delivery of the goods to the railway for the purpose of transmitting them to the buyer provided that the seller did not reserve the right of disposal. Translating this into the terms of ordinary commerce, if the seller delivered the goods to the railway for conveyance to self at Calcutta there would not be such an appropriation as would pass title to the purchaser. In order to complete the transaction it would be necessary to endorse the railway receipt and deliver it to the buyer. If, on the other hand, when this consignment was booked at the railway station in Cochin State the railway receipt was made out to the buyer, this would become a document of title vesting in the buyer alone the right of ownership in the goods while in transit. The mere fact that the document of title was retained in the custody of the seller, though it might give him some equitable lien over the goods, would not prevent the title from passing to the buyer."

With great respect we agree with the above observations in entirety, and to the extent the observations in Firm *P.M.R.S.* v. *B.C.J. & Sons*[2], differ from them, we differ from the Punjab decision and prefer to follow the decision of this Court.

So we come to the third point, namely, whether the property in the goods passed or did not pass to the plaintiffs, because the appellants reserved the right of disposal over them by consigning the goods to self and sending the railway receipt to the bank which must in the circumstances be held to be the appellants' agent, directing the bank to deliver the railway receipt duly endorsed to the plaintiffs only after the plaintiffs had paid the bank the money due as per the draft and the bank's commission and the overdue interest if any. Mr. R. Gopalaswami Iyengar urged that such action on the part of the appellants would only amount to securing the contract price before parting with the railway receipt, and that the property in the goods would still pass to the buyers, the plaintiffs. He relied on an observation in paragraph 295, at page 223, of Volume 29 of Halsbury's Laws of England, II Edition. But, as Mr. Bashyam pointed out, that paragraph itself states in another place that if the seller takes the bill of lading to his own order, and parts with it to a third person, not the buyer, (like the bank here) and that third person by virtue of his possession of the bill of lading gets the goods, the buyer is held not to have the property so as to enable him to recover from the third party, notwithstanding that the act of the seller was a clear breach of the contract. That would show the observations of Wadsworth, *Offg. C.J.*, in *Siddique & Co.* v. *Mysore Textile Agencies*[1], to be correct and the observations of Bishan Narain, J., if taken to be to the contrary, in Firm *P.M.R.S.* v. *B.C.J. & Sons*[2] to be not correct.

Mr. Gopalaswami Iyengar then relied on a ruling of a Bench of the Allahabad High Court in *Peare Lal* v. *Diwan Singh*[3], for both the second and the third points. That ruling will not also help him. In our opinion, it simply says that the intention of the parties would be the governing factor. It says :

"The real question in all such cases is whether the parties did intend that property should pass . . . . . The true, test, therefore, is what was the intention of the parties."

In other words, each case has to be decided on its own facts, regard being had to the intention of the parties under the particular contract. Here we have no doubt that the intention of the parties was that the goods had to be delivered at Sattur, despite the use of the word 'despatched' and that the sellers should have control over the goods and the property in them till the buyers paid the price to the bank at Tenkasi and got the railway receipt endorsed in their favour, after paying the price, the bank's commission and overdue interest, if any and not a second before. In circumstances, as are proved in this case, the property in the goods remained till then only in the sellers as is clear not only from the ruling in *Siddique & Co.* v. *Mysore Textile Agencies*[1], quoted above, but also from the rulings in *The Ford Automobiles* v. *Delhi Motor Co.*,[4] *The Bank of Morvi, Ltd.* v. *Baerlein Bros.*[5], *Sunder Singh* v. *Gulab Singh*[6]

1. (1947) 1 M.L.J. 249.
2. A.I.R. 1956 Punj. 217.
3. A.I.R. 1930 All. 661.
4. A.I.R. 1923 Bom. 125.
5. (1924) I.L.R. 48 Bom. 374.
6. A.I.R. 1927 Lah. 269.

Jagadish Prosad v. *Produce Exchange Corporation*[1], and *Governor-General in Council* v. *Joynarain*[2], relied on by Mr. Bashyam. Mr. Bashyam relied also on the observations of the Supreme Court in *C. I. T., Madras* v. *Mysore Chromite, Limited*[3], to the following effect :

"It must, therefore, follow that at the earliest the property in the goods passed in London where the bill of lading was handed over to the buyer's bank against the acceptance of the relative bill of exchange."

He also contended that the property in the goods, covered by the suit contracts, passed to the buyers only when the railway receipt was handed over duly endorsed to the plaintiffs by the South India Bank, Tenkasi, on their paying the amount of the draft and the Bank's commission, and the overdue interest, if any, on 16th March, 1950, that is, two days after the goods were destroyed by fire in transit. We agree.

Mr. Gopalaswami Iyengar then relied on the ruling in *The Parchim*[4], where the Privy Council held that the presumption raised by the provisions of the Sale of Goods Act regarding property covered by a bill of lading taken by the sellers in their own name, and not to be handed over to the buyers till the price was paid, could be rebutted by proving circumstances to the contrary showing that the sellers took the bill of lading in their name only to secure the contract price, and not with the intention of withdrawing the goods from the contract, in which case there will be nothing inconsistent with an intention to pass the property, and, therefore, the property may pass either forthwith subject to the sellers' lien, or conditionally on performance by the buyer of his part of the contract. They added:

"*Prima facie* the presumption in such a case appears to be that the property is to pass only on the performance by the buyer of his part of the contract and not forthwith subject to the sellers' lien. Inasmuch, however, as the object to be attained, namely, securing the contract price may be attained by the seller merely reserving the lien, the inference that the property is to pass on the performance of a condition only is necessarily and somewhat weak, and may be rebutted by the other circumstances of the case".

They then relied on two very strong circumstances showing that the property in that case had passed to the buyer, namely, (i) that the cargo in that ship was at the buyer's risk from the moment it was placed in it, evidenced by its insurance, by the buyer, showing that the property had been intended to pass to the buyer, and secondly that the contract was for the sale of the whole cargo of a named ship and that that cargo was clearly at the risk of the buyers from a time anterior to the capture. So that decision was based on those two exceptional circumstances. No such exceptional circumstances exist here, neither insurance by buyer, nor intention to pass the property to the buyer despite the appellants taking the railway receipt in their own name, and sending it to a third party, the Bank for being delivered to the buyers only after they paid the price and Bank commission, and got the railway receipt endorsed in their favour. So that ruling has no application to this case.

Mr. Gopalaswami Iyengar lastly urged that it is to the advantage of the seller that the property in the goods sold should pass at the earliest possible moment to the buyer, and that the appellants-sellers must have intended the property to pass to the buyers the moment the contracts under Exhibits B-1 and B-2 were concluded. The argument is not convincing. As Pollock and Mulla state, at page 138 of their Sale of Goods Act, 1933 Edition :

"It has been seen that, generally speaking, it is to the advantage of the seller that the property should pass, at the earliest possible moment, to the buyer. Nonetheless, in any good case, he may well think that it serves his interest better to retain ownership of the goods until some later period, until, for instance the price is paid or bill of exchange accepted. If he clearly manifests this intention the law will give effect to it; and the rules of law laid down in the previous section (referring to section 24) relating to the passing of the property will in consequence be excluded."

In the present case, the appellants, the sellers, by their act, clearly intended that the property should pass to the plaintiffs-buyers only after they had paid the price, the Bank's commission and the overdue interest, if any, at Tenkasi, and got the

1. A.I.R. 1946 Cal. 245.
2. A.I.R. 1948 Pat. 36.
3. (1955) S.C.J. 185.
4. L.R. (1918) A.C. 157.

railway receipt taken in the appellants' name, endorsed by the Bank, as the appellants' agent, in their favour. So, under the provisions of the Sale of Goods Act, as well as under the above rulings, the property in the goods remained with the appellants, the sellers, on 14th March, 1950, the date when those goods were destroyed by fire.

This appeal deserves to be and is hereby dismissed with costs.

V.S. — *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE BALAKRISHNA AYYAR.

Velu Pillai .. *Petitioner**

v.

Sevuga Perumal Pillai .. *Respondent.*

Madras High Court (Appellate Side) Rules, rule 41-*A* (2)—*If* ultra vires—*Excusing delay in the presentation of a petition—Sufficient cause—What amounts to.*

Rule 41-A (2) of the Appellate Side Rules of the Madras High Court is *intra vires* as it is within the rule-making powers of the High Court under section 122 of the Code of Civil Procedure. The rule prescribing a specified number of days for presenting an application to the Court is a matter of procedure and the Court has power by rules framed by it to regulate the time relating to procedural matters.

It is true that, under rule 41-A (2) of the Appellate Side Rules the High Court is empowered to excuse the delay in presentation of a petition if sufficient cause is shown. The mere fact that the petitioner mislaid the bundle in his village is not a sufficient reason for excusing a long delay of 268 days.

Petition praying that in the circumstances stated in the affidavit filed therewith the High Court will be pleased to excuse the delay in filing the C.R.P. No. . . . . of 1957 (S.R. No. 17267 of 1957) sought to be presented to the High Court to revise the order of the Court of the District Munsif of Tirumangalam, dated 19th June, 1956 and made in E.A. No. 99 of 1956 in E.P. No. 297 of 1955 in S.C.S. No. 190 of 1952.

K. Arunachala Sastri, for Petitioner.

M. V. Ganapathi and *M. V. Jagannath,* for Respondent.

The Court made the following

ORDER.—On 19th June, 1956, the District Munsif of Tirumagalam passed an order holding that E.P. No. 297 of 1955 was barred by limitation and that the defendant was entitled to the refund of a sum of Rs. 7 which he had paid on 13th February, 1956. The decree-holder who seeks to canvass the correctness of this order in revision filed a petition which has been numbered as S.R. No. 17267. Under Rule 41-A (2) of the Appellate Side Rules of this Court, such a petition has to be presented within ninety days from the date of the order complained of. The same rule empowers the Court to excuse the delay where sufficient cause is shown to its satisfaction. In the present case there was a delay of 268 days in filing the petition. The only ground on the basis of which I am invited to excuse the delay is that the petitioner mislaid the bundle in his village. That, in my opinion, is not a sufficient reason for excusing the delay.

When I expressed this view, learned counsel for the petitioner put forward the contention that Rule 41-A (2) is *ultra vires* the rule-making powers of this Court and that he is entitled to come to this Court regardless of the ninety days specified in that rule. In support of this contention he referred to the decision in *Abdul Ganny* v. *Mus. Russell*[1]. That case cannot help the petitioner because all that was decided there was that where an Article in the Limitation Act provides a particular period of time, it is not open to the Court in exercise of its rule-making powers to reduce that period of time. The Court ruled :

* C.M. No. 4388 of 1957. 29th January, 1958.
In C. R. P. No. . . . . of 1957.

1. A.I.R. 1930 Rang. 229 (F.B.).

"The High Courts are not entitled by rules to abrogate or vary the period of limitation set out in the Limitation Act, in respect of proceedings to which the provisions of Limitation Act, apply".

The decision in *Narasingh Sahai* v. *Sheo Prasad*[1], which was next cited does not take the petitioner any further. All that the Court decided was :

". . . . we are unanimous in holding that this Court has no power by any rule that it may make to alter the period of limitation prescribed by the Limitation Act."

It may be mentioned that rule 41-A (2) of the Appellate Side Rules of this Court does not in any way touch or alter the period of time prescribed by the Limitation Act.

In *Sennimalai* v. *Palani*[2], Coutts-Trotter, J., remarked :

"Whatever may be the case of the Statute prescribing say three years for an action to be brought I am quite clear that the articles in the Act limiting applications of this nature which are almost entirely interlocutory deal clearly with matters of procedure; and therefore the High Court has jurisdiction under section 122 to make the addition to O. 9, R.13."

This matter was examined exhaustively by a Full Bench of this Court in *Krishnamachariar* v. *Srirangammal*[3]. There it was held that a rule framed by this Court applying section 5 of the Limitation Act to an application under Order 9, rule 13 of Civil Procedure Code is *intra vires*. Learned counsel for the petitioner argued that in effect this decision merely gives a concession to persons who may be able to produce reasons to the satisfaction of the Court as to why the delay in a particular case should be excused. But the principle of the decision cannot be got rid of in this manner. The decision shows that the Court has power by rules framed by it to regulate or enlarge the time relating to procedural matters. The argument that the petitioner has a vested right to come up in revision at any time and that the decision of the Full Bench does not affect the right of his cannot be accepted. The Full Bench decision of this Court was followed in *Pandarinath* v. *Thakoredas*[4].

Now, nobody can dispute that a rule framed by a Court directing that certain kinds of applications shall be presented to certain of its officers is a rule of procedure; it may be a matter of detail; but it is still a matter of procedure. Similarly it cannot be controverted that a rule which directs that certain applications should be presented within certain hours of the day is also a matter of procedure. In like manner a direction that certain applications should be presented before a certain time would also be matter of procedure. This is made clear by Coutts-Trotter, J., in the judgment, I have already referred to.

Section 122, Code of Civil Procedure, empowers the High Courts to make rules regulating their own procedure and the procedure of the Civil Courts subject to their superintendence. The section specifically empowers the High Court by such rules not merely to annul or alter any of the rules in the first Schedule of the Code but also to add to them. This is a comprehensive power and is sufficient to empower the High Court to make a rule of the kind embodied in rule 41-A (2). Section 128, Code of Civil Procedure, to which the learned counsel for the petitioner referred, does not in any way cut down the ambit of section 122. The first sub-section of section 128 specifically states that the rules 'may provide for any matters relating to the procedure of civil Courts.' The enumeration that follows in the second sub-section is made "without prejudice to the generality of the powers conferred by sub-section (1)". I am clearly of the view that rule 41-A (2) of the Appellate Side Rules is *intra vires* of the powers of this Court. This petition is, therefore, dismissed with costs.

R.M. *Petition dismissed.*

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1. A.I.R. 1918 All. 389.
2. (1915) 32 I.C. 975 : A.I.R. 1917 Mad. 957.
3. (1924) 47 M.L.J. 409 : I.L.R. 47 Mad. 824 (F.B.).
4. A.I.R. 1929 Bom. 262.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE SUBRAHMANYAM.

Muthuswami Raja .. *Petitioner**

v.

Ramu Ammal .. *Respondent.*

Civil Procedure Code (V of 1908), Order 6, rule 17—Powers of Court—Amendment of written statement—Suit for partition by Hindu daughter-in-law against father-in-law and brothers-in-law—Father-in-law claiming certain properties as separate properties not liable to partition—Amendment seeking to add another item to the list of separate properties—Refusal—Propriety—Interference in revision—Section 115.

Any error due to a mistake in a pleading, such as a written statement, can be permitted to be corrected by an amendment made during the pendency of the suit. Whether in any particular case the amendment sought would rectify a mistake would depend on the facts of that case.

Where, in a suit for partition and separate possession by a widowed daughter-in-law against her father-in-law and brothers-in-law, the father-in-law defendant in his written statement claims certain items of property as his separate properties and therefore not partible, and subsequently applies for amendment of the written statement by adding one more item of property to the list of properties claimed as his separate properties, but the trial Court, without considering whether the failure to include this item in the original list was or was not due to a mistake, refuses to allow the amendment the Court acts with material irregularity in the exercise of its jurisdiction, and the order refusing to allow the amendment is liable to be set aside by the High Court in revision.

Petition under section 115 of Act V of 1908 praying the High Court to revise the Order of the Court of the Subordinate Judge of Ramanathapuram at Madurai, dated 7th July, 1956 and made in I.A. No. 156 of 1956 in O.S. No. 80 of 1955.

R. Swaminatha Ayyar and *S. Venkatesan*, for Petitioner.

A. Sundaram Ayyar, for Respondent.

The Court delivered the following

Judgment.—The petitioner seeks to revise the order of the learned Subordinate Judge of Ramanathapuram declining to allow the petitioner to amend his written statement. The suit was by the defendant's daughter-in-law, the widow of his deceased son, for partition and separate possession of the properties which belonged to the joint family consisting of the petitioner, the plaintiff's husband and his brothers. The petitioner in his written statement gave a list of the properties which were his separate properties and admitted by implication the plaintiff's right to partition and separate possession in respect of the other properties in the plaint schedule. By the application for amendment which has given rise to this revision petition, the petitioner prayed that one other item be added to the properties which he claimed as his separate property. The learned Subordinate Judge considered that to allow the amendment would be to permit the petitioner to go back on his admission that that particular item belonged to the joint family and that the petitioner should not be allowed to do so. In that view, he dismissed the petition.

The learned Subordinate Judge does not say that the petitioner's failure to include this particular item among the items of his separate properties was not due to a mistake. Any error due to a mistake could be permitted to be corrected by an amendment made during the pendency of the suit. Whether in any particular case the amendment would rectify a mistake would depend on the facts of that case.

The learned advocate for the respondent relies on *Shekmasthan Sahib* v. *Balaram Reddi*[1], in support of his proposition that a party ought not to be allowed by way of amendment to change an earlier allegation made in his pleading. I do not think that that ruling supports the proposition in that broad form. In that particular case, the cause of action pleaded in the plaint was examined in the written statement and certain admissions were made regarding material facts constituting the cause of action. The learned Judge held that the defendant should not by an

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* C.R.P. No. 1373 of 1956. 22nd November, 1957.

1. A.I.R. 1953 Mad. 958.

amendment be allowed to repudiate those admissions in relation to the material facts which constituted the cause of action. That decision cannot be held to apply to a case of a mistake in relation to an individual item of property in a case like the present.

The learned counsel for the respondent relies also on *Elayappa Pillai* v. *Ramaswami Jadaya Goundan*[1]. That was a case where the amendment, if allowed, would change the cause of action. That again cannot apply to the facts of the present case.

I consider that the learned Subordinate Judge acted with material irregularity in the exercise of his jurisdiction in refusing to allow the amendment prayed for. The learned Subordinate Judge overlooked the fact that, if the petitioner were held to the particular admission made in the statement initially filed in regard to this property, the petitioner would be prejudiced in relation not merely to the plaintiff but in relation to his other sons also. The learned Subordinate Judge's order is set aside. The petition is allowed. The written statement will be amended as prayed for. The petitioner will, however, pay the plaintiff's costs in the application for amendment in the lower Court and in the Civil Revision Petition in this Court.

P.R.N. ——— *Revision Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. P. RAJAGOPALAN, *Officiating Chief Justice* AND MR. JUSTICE BASHEER AHMED SAYEED.

K. P. M. Aboobucker .. *Appellant**

v.

K. Kunhamoo and others .. *Respondents.*

Civil Procedure Code (V of 1908), Order 39, rule 1 (a)—Property in dispute in danger of being wrongfully sold in execution of decree—Interim injunction—If could be ordered against a person who is not a party to the main suit.

An interim relief is granted to a person in any cause on the footing that he is *prima facie* entitled to the right claimed in the main relief and the interim relief.

Hence an interim relief sought for during the pendency of a suit could not be greater in scope than what could be granted in the suit itself after the party has established his right to that relief. Whether it be a question of jurisdiction or one of discretion of Court it is a very relevant factor to be taken into account in deciding whether a Court should or even could grant an interim relief of injunction, especially when the person against whom the interim injunction sought for is not a party to the suit and against whom no relief could be granted in the suit itself.

Sankara Iyer v. *Muhammad Ganni Rowther*, (1935) 70 M.L.J. 257 : I.L.R. 59 Mad. 774, referred and explained.

Appeal preferred to the High Court against the Order of the Additional Judge, City Civil Court, Madras, dated 2nd November, 1957 and made in I.A. No. 832 of 1957 in O.S. No. 1119 of 1955.

R. Gopalaswami Ayyangar and *K. N. Balasubramanian*, for Appellant.

S. V. Venugopalachari, *P. C. Parthasarathi Ayyangar* and *R. Ramaswami*, for Respondents.

The Judgment of the Court was delivered by

Rajagopalan, O.C.J.—This is an appeal against the order of the Additional City Civil Judge, Madras, passed on an application preferred under Order 39, rule 1, Civil Procedure Code, in O.S. No. 1119 of 1955, refusing to grant the interim injunction asked for by the appellant, the petitioner in the lower Court, against the contesting respondent, the decree-holder in C.S. No. 228 of 1954. It should be convenient to refer to the decree-holder in C.S. No. 228 of 1954 as the respondent in the rest of this judgment.

1. (1946) 1 M.L.J. 373.

* C.C.C. Appeal No. 92 of 1957. 20th December, 1957.

I shall first set out the relevant details of what preceded this appeal. Abdulla carried on business in timber. It was common ground that he had business dealings with the respondent for a number of years. Abdulla died in 1939, leaving behind him his widow and six minor children, three daughters and three sons, of whom the appellant was one. He also left behind a comparatively large extent of properties including the business in timber. Abdulla's brother Ummerkutti claimed that the business in timber that Abdulla carried on was a partnership concern, in which the brothers were partners. In the arrangements made subsequent to the death of Abdulla, his minor children were represented by their mother as their guardian. It may not be necessary to set out all the details of this arrangement or their validity. They constitute the subject-matter of O.S. No. 1119 of 1955, which still remains to be disposed of. After 1941 the business was carried on by Ummarkutti and Kunhamoo in partnership. Kunhamoo, the eldest of the sons of Abdulla, had by then become *sui juris*. It should be convenient to refer to Ummarkutti and Kunhamoo as defendants 1 and 2 respectively in the rest of this judgment; they were so arrayed in O.S. No. 1119 of 1955. During the pendency of that suit the first defendant died. The claim of the first defendant in the suit was that in the arrangements that ensued the death of Abdulla; the business and some other assets of Abdulla were allotted to the share of defendants 1 and 2. One of the daughters of Abdulla filed a suit for partition, C.S. No. 271 of 1952, on the Original Side of this Court, which was subsequently transferred to the City Civil Court and numbered as O.S. No. 1119 of 1955. The appellant who was impleaded as defendant 5 supported the claim of the plaintiff in that suit. There the plea was that none of the children of Abdulla who were among his heirs was bound by the arrangements made during their minority by their mother, who was not their legal guardian. The suit was for the partition of the assets of the deceased Abdulla including the business in timber which was claimed to be the sole concern of Abdulla, in which his brother, the first defendant, had no share. On 13th March, 1953, defendants 1 and 2 were appointed Receivers in that suit, among other things to conduct the business which was a running one. I have set out these details, on which the learned counsel for the appellant relied to support his plea, that there was enough to show *prima facie* that the appellant has rights, though they have yet to be adjudicated upon, in the properties of Abdulla.

The first and second defendants, it should be remembered, carried on the business after 1941. They were indebted to the respondent on the dealings between them. The respondent supplied timber for their trade even as he had been supplying material during the lifetime of Abdulla. Defendants 1 and 2 created an equitable mortgage over two sets of immovable properties in favour of the respondent in 1950. It was common ground that these properties also were claimed to be properties of Abdulla, in which his heirs claimed their respective shares in O.S. No. 1119 of 1955. The respondent filed C.S. No. 228 of 1954 in the High Court on its Original Side and eventually obtained a decree for the sale of the hypotheca. Before instituting C.S. No. 228 of 1954 the respondent obtained leave of the High Court for suing defendants 1 and 2 who had been appointed by that Court as Receivers in the partition suit. That leave, however, was obtained without notice to the parties in the partition suit other than defendants 1 and 2.

Though the respondent knew of the pendency of the suit for partition which had been instituted in 1952, itself, he did not have the heirs of Abdulla impleaded in his suit on the mortgage. The appellant was thus not a party to the decree in C.S. No. 228 of 1954. Similarly the respondent even after he obtained a decree in C.S. No. 228 of 1954, was not impleaded as a party defendant in O.S. No. 1119 of 1955. I must make it clear that these are only factual statements, and that I am not concerned now with the question whether they were necessary or even proper parties or not in the respective suits.

In execution of the decree in C.S. No. 228 of 1954 the respondent as decree holder brought the hypotheca to sale. The sale was proclaimed to be held on 17th October, 1957. The appellant applied to the learned Additional Judge on

27th September, 1957, for the issue of an interim injunction to restrain the respondent from bringing the property to sale. The application itself was in proceedings in O.S. No. 1119 of 1955, in which it should be remembered the respondent was not a party defendant. The learned Additional City Civil Judge dismissed that application on 2nd November, 1957, principally on the ground that the decree in O.S. No. 228 of 1954, in execution of which the property was brought to sale, was not a wrongful decree. The learned Judge was obviously of the view that that failed to satisfy the requirements of Order 39, rule 1 (*a*), Civil Procedure Code. The appeal before us is against that order.

During the pendency of this appeal, by an order of Ramaswami, J., in C.M. P. No. 7655 of 1957, dated 25th November, 1957, though the sale itself was not stayed, confirmation of the sale was stayed till the disposal of this appeal. The adjourned sale was held on 11th December, 1957, the date on which the appeal first came on for hearing before us. It was represented to us that the first item was sold, and that in the absence of bidders the second item was not sold. I have set out these facts only to complete the narrative, though it may have no bearing on the determination of the main question in controversy between the parties.

What was argued at length before us was whether the Court has jurisdiction during the pendency of the suit, O.S. No. 1119 of 1955, to grant an injunction under Order 39, rule 1 (*a*), Civil Procedure Code, against the respondent, who was himself not a party to that suit. The learned counsel for the respondent contended that Order 39, rule 1 (*a*), did not confer such a jurisdiction. The learned counsel for the appellant pointed out the difference between the language of rule 1 (*a*) on the one hand and that of rules 1 (*b*) and 2 (1) of Order 39 on the other and urged that the scope of rule 1 (*a*) was larger and included within it persons who were not themselves parties to the suit in which the interim injunction was sought. The learned counsel submitted that unlike rule 1 (*b*) and rule 2 (1), rule 1 (*a*) of Order 39 did not in express terms restrict the issue of an injunction only against the defendant in the action.

In neither *Varadacharyulu* v. *Narasimhacharyulu*[1], nor *Sankara Aiyar* v. *Muhammad Gani Rowther*[2], in which a Division Bench approved of what was laid down by Phillips, J., in *Varadacharyulu* v. *Narasimhacharyulu*[1], to both of which the learned Additional City Civil Judge referred, did the question arise in the form in which it arises before us, whether the words " danger of being wrongfully sold in execution of a decree " as they occur in rule 1 (*a*) of Order 39 are wide enough to include within them an interim injunction directed to a person who is not himself a party to the main suit.

In *Varadacharyulu* v. *Narasimhacharyulu*[1], the injunction sought was against the defendant in that suit, to restrain him from executing a decree obtained by him against the plaintiff's father. Phillips, J., observed :

> "It is now contended that such an injunction will come under Order 39, either rule 1, or rule 2. It certainly cannot come within the language of rule 1, for there is no suggestion that the property of which delivery is to be given is in danger of being wasted, damaged or alienated."

The learned Judge held further that the claim of the plaintiff in that suit would not fall within the scope of rule 2 either. It was with reference to rule 2 that the learned Judge pointed out :

> " It is then argued that rule 2 would be applicable and that this is an injunction to restrain the defendant from committing 'other injury of any kind'. The alleged injury is the execution of a decree lawfully obtained. In order to hold that that does constitute an injury, it is necessary to hold that the decree is illegal, for, if the decree is legal, the defendant has every right to execute it and in doing so he cannot be said to commit any injury."

The learned Judge did not refer to the other class of cases for which also Order 39, rule 1 (*a*) provided, where the property in dispute in a suit is in danger of being wrongfully sold in execution of a decree. *Varadacharyulu* v. *Narasimhacharyulu*[1],

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1. (1925) 23 L.W. 85. 2. (1935) 70 M.L.J. 257 : I.L.R. 59 Mad. 744.

cannot therefore be really looked upon as having decided what constitutes danger of a property being wrongfully sold in execution of a decree.

In *Sankara Ayyar* v. *Muhammad Gani Rowther*[1], the head-note ran :

"In a mortgage suit by the appellant against the respondents and in a partition suit by the latter against the former a common issue was raised as to whether the mortgage sued upon by the appellant was binding on the shares of the respondents. The decision on that issue in the partition suit was agreed by the parties to be taken as the decision on the issue in the mortgage suit. In the partition suit the mortgage was declared binding on the shares of the respondents and a decree by consent was accordingly passed in the mortgage suit against their shares. There was no appeal against the decree in the mortgage suit but an appeal was presented to the High Court against the decree in the partition suit. The respondents applied to the High Court under Order 39, rule 1, of the Code of Civil Procedure, for an injunction restraining the appellant from bringing the property of the respondents to sale in execution of the decree in the mortgage suit pending the appeal in the partition suit.

Held, that the injunction applied for could not be granted."

Thus the position there also was that the person who sought the injunction and the person against whom that injunction was sought were parties to the litigation during the pendency of which that interim injunction was asked for. Beasley, C.J., pointed out :

"This is not a case where the property of somebody not a party to the decree is in danger of being sold and that person comes forward with a claim that it is his property and cannot be sold."

The case before us is something like that which the learned Chief Justice was not called upon to consider in *Sankara Ayyar* v. *Mohammad Gani Rowther*[1].

In *Sankara Ayyar* v. *Muhammad Gani Rowther*[1], the learned Chief Justice observed, at page 261 :

"I very strongly take the view that, when a decree has been passed against a party who is himself seeking to obtain an injunction, the Court has no jurisdiction whatever, merely because an appeal is pending in another suit, to grant an injunction on the ground that the property is in danger of being wrongfully sold in execution. If the other view were correct, then the appellant would have a greater remedy in such cases, *i.e.*, an injunction, than he has in the suit under appeal. Whilst the decree remains unreversed, it is a good decree and all steps in execution of it are perfectly legal."

Whether it was really a case of jurisdiction or one of discretion, the scope of both of which was governed by Order 39, rule 1 (*a*), and whether the proposition laid down by the learned Chief Justice in the first sentence of the passage I have extracted above is not too wide as it stands, if taken out of its context, may have to be considered should occasion arise for it. However, if I may say so with respect, I find myself in complete agreement with the principle that underlies the second sentence in the passage I have extracted above, that an interim relief granted during the pendency of a suit should not be of greater scope than what could be granted in the suit itself, after the party has established his right in the suit to that relief. In my opinion, that would be a very relevant factor to be taken into account in deciding whether a Court should or even could grant such an interim relief, especially so when the person against whom the interim injunction is sought is not a party to the suit, and against whom no relief could be granted in the suit itself.

Since in my opinion the disposal of the appeal before us can be rested on a fairly narrow basis, I do not consider it necessary to refer to the other cases cited during the arguments before us. My attention was not drawn to any reported case where a person successfully claimed an injunction against one who was himself not a party to the suit or a person who did not claim under a party to this suit, during the pendency of which such an injunction was sought.

The learned counsel for the appellant urged that what Order 39, rule 1 (*a*) required was that with reference to the property in dispute in a suit there is a danger of that property being wrongfully sold in execution of a decree. His further sub-

1. (1935) 70 M.L.J. 257 : I.L.R. 59 Mad. 744.

mission was that what was postulated was that the execution should be wrongful and not that the decree itself had been wrongfully obtained. He realised that there was no allegation in the plaint in O.S. No. 1119 of 1955 that the respondent had committed any wrong in obtaining the decree in C.S. No. 228 of 1954. In fact, there was no reference at all to the mortgage or the decree in the plaint in O.S. No. 1119 of 1955. I shall assume for the present that the mortgage decree itself was not wrongfully obtained, but that the execution of that decree would be wrongful, in the sense that it would affect adversely the right the appellant claimed in the property brought to sale. It is not quite necessary to decide that question in these proceedings. Even so, the question remains, whether in the circumstances of this case, the appellant is entitled to the relief of interim injunction that he seeks.

Apart from the fact that the respondent was not a party to the partition suit (O.S. No. 1119 of 1955) none of the parties to that suit including the appellant asked for any relief in that suit with reference to the mortgage effected in favour of the respondent in 1950 by defendants 1 and 2. That is still the position even after Rajagopala Ayyangar, J., pointed out in the course of his judgment in C.S. No. 228 of 1954 :—

> " In the written statement.........it is stated that the decree here should make it clear that in the event of C.S. No. 271 of 1952 (O.S. No. 1119 of 1955) succeeding the liability for the suit claim should be shared by all the other heirs who would get an interest in the firm............ The liability in this suit is admittedly a liability of the firm which is clear by the Receivers being impleaded in the suit and the claim of the Plaintiff in C.S. No. 271 of 1952 (O.S. No. 1119 of 1955) is merely a right to the assets of the firm. Those assets would be ascertained only after the debts by the firm are discharged, and there cannot be any claim to the assets of the firm before this decree is discharged. In these circumstances, I consider that it is not necessary to introduce any reservation in the judgment to clarify the position."

Whether the decree in the mortgage suit is one that would not bind the shares, if any, of those other than defendants 1 and 2 in the suit properties, is not, as I understand it, one of the issues that has been raised for determination in the partition suit, independent of the question, whether the determination of such an issue in that suit would bind the respondent who was not a party to that suit. Therefore, no question could arise in the main suit itself of the grant of even a declaration, that the mortgage decree was not binding on the heirs of Abdulla, including the appellant.

An interim relief is granted to a person on the footing that that person is *prima facie* entitled to the right, on which is based the claim for the main relief as well as the interim relief. That relief is granted as an interim measure till the disposal of the suit, in which is to be investigated the validity of the claim of right that has been put forward. If no such claim has been put forward in the suit, it means that there can be no occasion for investigation of such a claim in the suit, there can be no justification for the grant of an interim relief which will just lapse on the termination of the suit, but which will leave the parties in the same position in which they were before the institution of the suit, in the course of which the interim relief was sought and obtained. That, as I conceive it, is not the scope of Order 39, rule 1 (*a*), Civil Procedure Code. In the present case the rights of the respondent, the decree-holder in C.S. No. 228 of 1954, will remain unaffected by the disposal of the partition suit, O.S. No. 1119 of 1955.

Under such circumstances where no relief could be granted to the appellant against the respondent in the main suit itself, it is not permissible to grant any interim relief, to be operative till the disposal of the suit. Even were it only a question of discretion, I should hold that in such a case the Court should exercise its discretion against the grant of interim injunction. I would go further and hold that the Court has no jurisdiction to grant by way of interim relief what could never be granted in the main suit itself. It is on this basis that I rest my decision to confirm the order of the learned Additional City Civil Judge, who refused to grant interim injunction for which the appellant-petitioner applied.

This appeal is dismissed with costs.

R.M. *Appeal dismiss*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE BASHEER AHMED SAYEED.

S. Raju Gramani .. *Petitioner**

v.

Srinivasa Gramani .. *Respondent.*

Madras Court-Fees and Suits Valuation Act (XIV of 1955), section 12 (2)—Objection by defendant relating to Court-fee—If could be raised only in the written statement.

Section 12 (2) of the Madras Court-Fees and Suits Valuation Act, 1955, provides that a defendant in any suit may either by his written statement filed before the first hearing of the suit or before evidence is recorded on the merits of the claim, plead that the subject-matter of the suit has not been properly valued or that the Court-fee paid is insufficient. The word 'plead' used in the section is wider and is not restricted only to the written statement. A defendant has opportunity to raise an objection relating to Court-fee either at the time of filing his written statement or subsequently by a petition supported by an affidavit before the evidence is recorded.

Petition under section 115 of Act V of 1908 praying the High Court to revise the order of the Court of the First Assistant Judge, City Civil Court, Madras, dated 7th September, 1956 and made in I.A. No. 626 of 1956 in O.S. No. 1853 of 1955.

G. R. Jagadisan, for Petitioner.

M. A. Srinivasan and *M. A. Rajagopalan*, for Respondent.

The Court delivered the following

JUDGMENT.—This Civil Revision Petition is against the order of the learned first Assistant City Civil Judge, appointing a Commissioner directing him to find out the market value of the suit property in O.S. No. 1853 of 1955 on the file of this Court. The suit is for eviction of the defendant from the property. The defendant filed his written statement, but in the written statement he did not raise the question of inadequacy of the Court-fee paid for the suit. After the written statement having been filed, in a petition supported by an affidavit, the defendant raised an issue with regard to the proper Court-fee for the suit. After hearing the parties, the learned First Assistant City Civil Judge appointed a Commissioner to find out the market value of the suit property. In this Civil Revision Petition objection is taken by the plaintiff that the defendant, not having pleaded in his written statement that the Court-fee paid was inadequate, was precluded from raising the plea with regard to inadequacy of the Court-fee paid in a petition supported by an affidavit.

Mr. Jagadisa Ayyar, appearing on behalf of the petitioner-plaintiff, relies upon the language of section 12, clause (2) of Madras Act XIV of 1955. That section is to the effect that any defendant may, by his written statement filed before the first hearing of the suit, or before evidence is recorded on the merits of the claim, plead that the subject-matter of the suit has not been properly valued, or that the fee paid is not sufficient. The word used is "plead" and the learned counsel for the petitioner contends that a petition supported by an affidavit cannot be a "pleading" and that it is not covered by the language of that section. But in my opinion it is too much of a straining of the term "plead" to say that the course adopted by the Respondent is not "pleading". It is true that an opportunity was available to the defendant to raise the question of adequacy of Court-fee paid, when the written statement was filed, but that opportunity was not availed of. The question is whether that opportunity not having been availed of, the defendant would be precluded from pleading at a later stage as provided for in the section relied on that the Court-fee paid by the plaintiff is inadequate. If the written statement alone is to be considered pleading, then certainly the language used in section 12, clause (2) of Madras Act XIV of 1955, that :

"any defendant may, by his written statement filed before the first hearing of the suit or before evidence is recorded on the merits of the claim, plead that the subject-matter of the suit has not been properly valued, or that the fee paid is not sufficient",

* C.R.P. No. 1538 of 1956. 14th October, 1957.

has no meaning. The section provides for opportunities being made available to the defendant even after he has filed his written statement and before evidence is recorded to " plead " that the Court-fee is not adequate. Some significance must be attached to this. But Mr. Jagadisa Ayyar argues that by that term pleading, after the written statement is filed and before evidence is recorded, would be only by means of an application for amending the written statement and then by means of such an amended written statement raising the question of inadequacy of Court-fee paid. In this case that procedure has not been adopted and it is urged that the language of the section does not warrant a separate petition for raising the issue as to Court-fee. On the other hand, what has been done by the defendant is that he went to the Court by way of an application or petition supported by an affidavit raising the question of inadequacy of Court-fee paid. I do not think that the learned counsel for the petitioner is right in contending that if the defendant fails to avail of the opportunity given to him to raise the question of Court-fee in his written statement or if he has not asked for an amendment of the written statement in order to enable him to raise the question of inadequacy of Court-fee, he is precluded from raising it by means of a petition supported by an affidavit. In my view, the term, ' pleading ' or ' pleadings ' is comprehensive enough not merely to include a written statement and plaint, but also a petition for the purpose of either amending the written statement, or plaint, or even for raising any questions which require to be considered by Court. Therefore, the procedure adopted by the defendant in this case cannot by any means be said to be not warranted by the language used in section 12, clause (2) of Madras Act XIV of 1955. Surely some significance must be attached to the clause in this case, namely " or before evidence is recorded on the merits of the claim may plead ". In this case after the written statement was filed, the evidence has not yet been recorded; and before the evidence is recorded, the defendant might either apply to Court for permission to amend the written statement, or if that is not done, it is open to him to approach the Court with a petition raising the question of inadequacy of Court-fee. As the petition is, as much a pleading as an application for an amendment of the written statement, to my mind the plea taken by the learned counsel for the petitioner seems to be rather too technical ; and I do not think that the ends of justice should be allowed to be defeated by any such technical plea.

It is no doubt true that the question of Court-fee is a matter primarily that of the Court and plaintiff, but when an opportunity is given to a defendant to plead that the subject-matter of the suit is not properly valued or that the Court-fee paid is not adequate, then certainly the defendant must be allowed to exercise that right, and in exercising that right he should adopt one of the two procedures referred to above. He might come to the Court by way of a petition for amendment of the written statement or he might ask the Court by means of a petition supported by an affidavit that the question of Court-fee may be determined. It is the latter procedure that has been adopted by the defendant in the present case. I do not think that that procedure is unwarranted by any means.

The learned First Assistant City Civil Judge has done the right thing in having appointed a Commissioner to find out the market value of the suit property. No doubt, advantage or disadvantage might ensue from the amendment of valuation and Court-fee in the plaint, but that advantage or disadvantage is for both the parties and depends largely upon how exactly the suit turns out to be in the course of trial and hearing. Therefore, I am inclined to agree with the decision of the learned First Assistant City Civil Judge, and dismiss this Civil Revision Petition. I do not think that I need order costs in this petition.

R. M. *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE SUBRAHMANYAM.

S. M. Ranganatha Naicker .. *Petitioner**

v.

B. Govindaswamy Naidu and another .. *Respondents.*

Madras City Tenants' Protection Act (III of 1922), section 9 (1), Explanation—*"Land"—Meaning of—Lessee—Interest of—If capable of being transferred—Ejectment petition by lessee against sub-lessee—Application by sub-lessee under section* 9 (1)—*Maintainability—Owner of land—If necessary or proper party.*

The interest of a lessee of a plot of land is an interest in land capable of transfer within the meaning of the *Explanation* to section 9 (1) of the Madras City Tenants' Protection Act, 1922. The only interest which a lessee owns in the land leased is his interest as lessee under the owner and that interest is clearly capable of being conveyed.

An application under section 9 (1) of the Act can only lie against the landlord who has filed an application under section 41 of the Presidency Small Cause Courts Act. The owner of the land who has not filed such a petition is not a necessary or proper party to a petition under section 9 (1) of the City Tenants' Protection Act, filed by the sub-lessee against the original lessee.

Petition under section 115 of Act V of 1908 praying the High Court to revise the order of the Court of the Small Causes at Madras, dated 13th February, 1956, and made in M.P. No. 2562 of 1955 in Ejectment Suit No. 117 of 1955.

G. Venkataraman, for Petitioner.

M. V. Gopalaratnam, for Respondent No. 1.

V. Ramaswami and *G. Ramanujam,* for Respondent No. 2.

The Court made the following

ORDER.—The first respondent instituted an application against the petitioner in the Small Cause Court, Madras, in ejectment, under section 41 of the Presidency Small Cause Courts Act. The first respondent alleged in that petition that he had taken the property on lease from the Administrator-General who was managing the estate of a minor and that the estate was handed over by the Administrator-General to the owner in 1955. The first respondent pleaded further that he had attorned to the guardian of the minor and that he continued to be the lessee of the property involved in this litigation. The parcel of land concerned in the application formed part of a much larger plot. The first respondent alleged that he had taken that plot on lease from the Administrator-General and that he continued as lessee of that larger plot under the owner. He alleged further that that larger plot was divided into several parcels, one of which formed the parcel, to which the application in the Small Cause Court related and which was sub-leased by the first respondent to the petitioner. There seems to have been some controversy in the Small Cause Court between the petitioner and the first respondent regarding the precise relationship between them. The petitioner appears to have alleged in the Small Cause Court that the first respondent was a mere agent for collection of rents, originally under the Administrator-General and subsequently under the owner. To-day, however, Mr. G. Venkatraman, appearing for the petitioner, abandoned that plea that the first respondent was a mere agent for collection of rents and requested me to hear this petition on the basis that the first respondent had been a lessee under the Administrator-General and became lessee thereafter under the owner and that the petitioner was, and continues to be, sub-lessee under the first respondent. This petition is therefore heard and decided on that basis. Both the applications in the Small Cause Court filed under section 41 of the Presidency Small Cause Courts Act and the petition under section 9 (1) of City Tenants Protection Act will be heard in the lower Court on the basis that the first respondent is lessee under the owner and that the petitioner is sub-lessee under the first respondent.

Under section 9, the petitioner filed a petition that the first respondent-landlord be directed to sell the land for a price to be fixed by the Court. To that petition,

* C.R.P. No. 498 of 1956. 1st November, 1957.

the petitioner made the first respondent and the second respondent parties. The second respondent, according to the learned advocate for the respondents, is the mother of the minor to whom the property belongs. She says that she does not have any interest of her own in the property. The learned counsel for the petitioner says that he does not know whether the property belongs to the mother or to her daughter. In any event, an application under section 9 (1) of the City Tenants Protection Act can lie only against the landlord who has filed an application under section 41 of the Presidency Small Cause Courts Act. Since neither the owner, namely, the minor girl nor her mother, namely, the 2nd respondent filed any application in ejectment, the second respondent was not a necessary or proper party to the petition filed by the petitioner under section 9 (1) of the City Tenants' Protection Act. She will be exonerated from the application filed by the petitioner under section 9 (1).

We have now to consider the petition filed by the petitioner (sub-lessee) under section 9 (1) of the City Tenants' Protection Act as against the first respondent (lessee). The learned Registrar, Small Cause Court, who heard the petition said that the petitioner was not entitled to relief and dismissed the petition. He gave two reasons in support of that order. The first is that the petitioner was not entitled to compensation under section 3 of the Madras City Tenants' Protection Act. Section 3 entitles a tenant who has constructed any building on the land to compensation for such construction. The learned Registrar overlooked the schedule of property which includes a superstructure constructed on the site. The learned counsel for the respondent concedes quite fairly that that particular reason given by the Registrar cannot be supported.

The second reason given by the learned Registrar is that the first respondent did not have power to transfer the interest which he had in the property. It is difficult to follow the learned Registrar's reasoning. Section 9 (1) of the City Tenants' Protection Act enacts :

> "Any tenant who is entitled to compensation under section 3 and against whom......a proceeding under section 41 of the Presidency Small Cause Courts Act has been taken by the landlord may ....apply to the Court for an order that the landlord be directed to sell the land for a price to be fixed by the Court".

The *Explanation* to the section thus defines land :

> "Land" means the interests of the landlord in the land and all other interests which he can convey under any power................."

The first respondent's own allegation in the application which he filed was that he was a lessee under the owner. The interest of a lessee is an interest in land capable of transfer. It is difficult to see why the learned Registrar thought that the first respondent's interest in the land could not be transferred. He apparently misunderstood the meaning and scope of the expression " all other interests which he can convey under any power ". That phrase is added so as to confer power on the Court to compel the landlord to transfer not merely the interest which he owns for his own benefit but also any other interest which, by reason of any power conferred on him by some other person, he could transfer. It is not the petitioner's case that the first respondent has power to transfer any interest which he does not himself own in the land. The only interest which the first respondent owns in the land is his interest as lessee under the owner. That interest is clearly capable of being conveyed.

The order of the Registrar, Small Cause Court, is set aside. The second respondent is exonerated in the petition filed under section 9 (1) of the City Tenants' Protection Act in the lower Court. The Registrar will restore the petition to its original number on his file and will proceed to pass an order directing the landlord to sell the land for a price to be fixed by the Registrar, the land being the interest of the first respondent as lessee so far as the lease relates to this particular parcel of land.

The parties will bear their own costs in this Civil Revision Petition.

P.R.N. *Petition allowed ; Order set aside.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE RAMASWAMI.

T. W. Dhanalakshmi and others .. *Petitioners**.

Madras Hindu Religious and Charitable Endowments Act (XIX of 1951), sections 57, 62, 87 and 93—Scope and effect of—Certificate under section 87—Effect of—Enforcement of—Powers of Magistrate—Remedy of party aggrieved—Suit under section 62—Application for injunction restraining execution or enforcement of certificate—Maintainability.

The powers of a Magistrate under section 87 of the Madras Hindu Religious and Charitable Endowments Act are neither more nor less than that of an executing Courrt. He cannot go behind the certificate issued by the Commissioner but must take it as it stands. He has no power to entertain any objection to the validity, legality or correctness of it, or to the jurisdiction of the authority issuing the certificate. He cannot alter, vary or add to its terms even by consent of parties ; nor is he entitled to refuse to execute it.

Jai Naran v. *Kedar Nath*, (1956) 1 M.L.J. (S.C.) 151 : (1956) S.C.J. 301 : (1956) An W.R. (S.C.) 151, *Kannayakka* v. *Narayaneppa*, (1946) 2 M.L.J. 111, *Prattipati Dandiah* v. *Venkatarama Dikshitulu*, (1953) 2 M.L.J. 550, relied on.

The only remedy of an aggrieved party is to file a suit which is specifically excluded from the bar of section 93 of the Act as well as the consequences arising from the second proviso to section 87.

The suit contemplated which, by reason of the third proviso to section 87, can be maintained in a civil Court is one which arises under section 57, which enumerates the jurisdiction of the Deputy Commissioner. Section 57 (*c*) enables him to decide whether any property or money is a religious endowment and it is under this power that he is able to issue the certificate contemplated in section 87.

Any party aggrieved by the decision of the Commissioner or the Deputy Commissioner has the right to file a suit which is specifically taken out of the operation of the bar under section 93 and the conclusive effect of the certificate under the second proviso to section 87.

In the case of such a suit, the Court may modify or cancel the order, but it has no power to stay the order of the Commissioner or Deputy Commissioner, pending disposal of the suit, as provided in section 62. Therefore, in view of sections 57, 62, 87 and 93, an application for the issue of an injunction restraining the execution or enforcement of the certificate issued under section 87, pending the result of the suit is incompetent and has to be dismissed without any examination of the merits altogether.

Case-law reviewed.

Petition praying that in the circumstances stated in the affidavit filed therewith, the High Court will be pleased to issue an injunction restraining the Respondent from enforcing the order of the Deputy Commissioner, Hindu Religious and Charitable Endowments Board, Coimbatore, in C.No. 10141 of 1956, dated 11th February, 1957, pending C.C.C. A. No. 81 of 1957, preferred to the High Court against the order of the City Civil Court of Madras, dated 14th September, 1957, in I.A. No. 459 of 1957 in O.S. No. 872 of 1957.

U. Somasundaram, R. Thirumalaisami Naidu and *P. Kothandaraman*, for Petitioners.

The Court made the following

ORDER.—This is an application for the issue of an *ad interim* injunction pending disposal of C.C.C. A. No. 81 of 1957.

The facts are : In Tiruvanmiyur there is a temple by name Sri Maruntheswaraswami temple. It is represented by its executive officer, Umapathi Desikar. Among the properties claimed as temple endowments there is an item, *viz*., house bearing door No. 21, Mari Chetti Street, Mylapore. The executive officer applied for a certificate under section 87 of the Hindu Religious and Charitable Endowments Act, 1951, on account of his being obstructed or prevented in taking possession of this property by persons claiming under a former trustee, one Kandaswami Chettiar. The Endowments Commissioner, following the procedure prescribed in section 87, has issued a certificate. Thereupon the petitioners claiming under the former trustee have filed O.S. No. 872 of 1957 in the City Civil Court, Madras,

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* C.M.P. No. 7145 of 1957. (C.C.C. A. No. 81 of 1957). 4th November, 1957.

for the reliefs of declaration, etc., that the property in question is not a religious endowment but it is joint family property belonging to the family of Kandaswami Chettiar. The petitioner filed an application for an interim injunction restraining Umapathi Desikar from executing or enforcing the certificate issued under section 87.

The learned City Civil Judge took upon himself the wholly supererogatory task of examining at great length the merits of the petitioners' case and came to the conclusion that the petitioners have not adduced any *prima facie* evidence to show that the suit property is the property of Kandaswami Chettiar and Subbaraya Chettiar and that on the other hand the temple had adduced *prima facie* evidence showing that it constitutes a temple endowment and that the balance of convenience lay in favour of the temple, because the temple having obtained a valid certificate under the Act, it follows that possession should go to the temple till the petitioners are able to establish their title to the property. In addition, it was also clear that the petitioners would not suffer any irreparable injury by possession being taken by the temple. Therefore, applying the principles for granting or withholding an injunction, the learned City Civil Judge on the merits came to the conclusion that the petitioners were not entitled to the injunctions asked for and dismissed the application. Hence the Appeal and the application for interim injunction.

I have just now mentioned deliberately that the learned City Civil Judge had taken upon himself the wholly supererogatory task of examining the claim put forward by the petitioners on merits. In fact the order of the learned City Civil Judge shows an inadequate comprehension of the relevant sections of the Hindu Religious and Charitable Endowments Act apparently on account of the fact that the relevant provisions were not placed before him by the advocates appearing on either side. The relevant sections are sections 87, 93, 62 and 57 of the Hindu Religious and Charitable Endowments Act.

The scope of section 87 has recently been discussed by me in In re *Thiruvengada Mudali and others*[1], wherein I have reviewed the entire previous case-law on the subject. Section 87 empowers the issue of a certificate by the Commissioner after giving notice to the affected persons and hearing their objections, if any. There is an appeal provided from the order of the Deputy Commissioner. On the issue of such a certificate and after the disposal of the appeal, if any, the lawfully appointed trustee or executive officer has got to present it to the Magistrate of the First Class having jurisdiction and that Magistrate on such an application has to direct delivery to the person appointed as aforesaid, possession of the religious institution, records, accounts or properties thereof, as the case may be, comprised in the certificate. The powers of an executing Court have been repeatedly laid down in a long line of decisions which have been set out in an analytical and exhaustive statement of the case-law at page 690 and following section 38, No. 8 of the A.I.R. Commentaries on the Civil Procedure Code, 6th Edition (1957) Vol. 1, and also in the foot-notes to Mulla's Code of Civil Procedure, 12th edition, Vol. 1, page 166. The latest and final pronouncement is that of the Supreme Court in *Jai Narain* v. *Kedar Nath*[2]. The powers of a Magistrate under section 87 are neither more nor less than that of an executing Court. He cannot go behind the certificate. He must take the certificate as it stands. He has no power to entertain any objection as to the validity of the certificate or the legality or correctness of it or that the Court which passed it had no jurisdiction to pass it. He cannot alter, vary or add to its terms even by consent of parties. He is not entitled to refuse to execute it. See *Kinnayakka* v. *Naranappayya*[3], *Prattipati Dandiah* v. *Venkatarama Dikshitulu*[4], overruling *Narasimhacharyulu* v. *Kotayya*[5], and subsequently followed in *Krishnaswami Ayyangar* v. *Veeranna Chetty*[6], *Chidambaram Chetty* v. *State*[7], *Pubbiri* alias *Perumal Goundan* v. *Govinda Mudaliar*[8], *Marudan and two others* v. *Perumal and Suppayyan*[9].

1. Cr.R.C. No. 740 of 1957.
2. (1956) S.C.J. 301 : (1956) An. W.R. (S.C.) 151 : (1956) 1 M.L.J. (S.C.) 151.
3. (1946) 2 M.L.J. 111.
4. (1953) 2 M.L.J. 550.
5. (1952) 2 M.L.J. 217.
6. Crl. R. C. No. 849 of 1956.
7. (Crl. R.C. No. 466 of (1957). Since reported in (1958) 1 M.L.J. 314.
8. (Crl. M.Ps. No. 740 and 741 of 1957). Since reported in (1957) 2 M.L.J. 617.
9. Crl. R.C. No. 638 of 1957.

The only remedy of an aggrieved party is to file a suit and the filing of such a suit is specifically excluded from the bar of section 93 of the Act as well as the consequences arising from the second proviso to section 87. Section 93 lays down :

> " No suit or other legal proceeding in respect of the administration or management of a religious institution or any other matter or dispute for determining or deciding which provision is made in this Act shall be instituted in any Court of law, except under, and in conformity with, the provisions of this Act."

The second proviso to section 87 states :

> " Provided also that for the purpose of proceedings under this section, the certificate aforesaid shall be conclusive evidence that the properties to which it relates belong to the religious institution".

In the other words, but for the third proviso to section 87 which lays down " Provided further that nothing contained in this section shall bar the institution of a suit by any person aggrieved by an order under this section for establishing his title to the said property," by reason of section 93 as well as the second proviso to section 87, no one would be allowed to agitate in a civil Court a claim of title to the property which has been held to be a religious endowment by the Commissioner and is comprised in the certificate as such.

The suit which by reason of the third proviso to section 87 can be maintained in a civil Court is one which arises under section 57 of the Act. Section 57 enumerates the jurisdiction of the Deputy Commissioner. Clause (*c*) enables him to decide whether any property or money is a religious endowment. It is only by reason of this jurisdiction that he is empowered to enquire into the question whether certain property is a religious endowment or not and he is able to issue the certificate contemplated in section 87. Section 57 is jurisdictional and section 87 is procedural.

In regard to a decision by the Commissioner relating to any matter specified in section 57, any party aggrieved can file a suit and which suit is specifically taken out of the operation of section 93 and the conclusive effect of the certificate under the second proviso to section 87. In the case of such a suit the Court may modify or cancel such an order, but it shall have no power to stay the Commissioner's order pending disposal of the suit as provided in section 62 of the Act. This has been explained in *Nallamuthu Chimpireyya*, In re[1].

The net result of this analysis is that this application for issue of an injunction has got to be dismissed and is hereby dismissed.

P.R.N. ——— *Application dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE RAMASWAMI.

S. R. M. S. Chidambaram Chettiar .. *Petitioner**

Madras Hindu Religious and Charitable Endowments Act (*XIX of* 1951), *section* 87—*Scope of—Proceedings for delivery under certificate—Nature—Jurisdiction of Magistrate to go behind certificate—Plea that person in possession was not a trustee and that the property was held as inam burdened with service—If can be entertained or gone into.*

Section 87 of the Madras Hindu Religious and Charitable Endowments Act covers not only a trustee but also others including a person claiming or deriving title from a trustee and a person not entitled to be in possession. A plea by the person proceeded against in delivery proceedings that he is not a trustee but that his father was a trustee is not sustainable. Proceedings for delivery under section 87 of the Act are in the nature of execution proceedings, and the District Magistrate is in the same position as an executing Court. He is therefore precluded from examining the certificate on its merits and is bound to enforce it, taking it as it stands, without varying, altering or adding to the terms thereof even by consent of parties. The Magistrate is bound to direct delivery of the property and records, etc., though the party proceeded against does not admit the title of the temple or endowment. A plea by the party proceeded against that the lands are held by him as inam only burdened with service for performing a kattalai cannot be entertained or gone into.

Prattipati Dondiah v. *Venkatarama Dikshutulu*, (1953) 2 M.L.J. 550, followed.

Parankusam Ranganayakulu v. *P. Venkatanarasimhayya*, (1949) 1 M.L.J. 200 and *Narasimhacharyulu* v. *Kotayya*, (1952) 2 M.L.J. 217, not followed.

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1. (1952) 2 M.L.J. 441.

*Cr.R.C. No. 466 of 1957. (Cr.R.P. No. 456 of 1957). 19th July, 1957.

Petition under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the order of the Court of the District Magistrate (Judicial), South Arcot at Cuddalore, dated 16th May, 1957 and made in Criminal M.P. No. 31 of 1957.

T. A. Ramaswami Reddi, for Petitioner.

V. V. Radhakrishnan for Public Prosecutor (*P. S. Kailasam*) for State.

The Court made the following

ORDER.—This is a Revision sought to be filed against the order made by the learned District Magistrate of South Arcot at Cuddalore in Cr.M.P. No. 31 of 1957, under section 87 of the Madras Hindu Religious and Charitable Endowments Act.

The facts are :—The temple of Sri Patalisvaraswami, Tirupapuliyur, through its Executive Officer, obtained a certificate relating to the properties under consideration that they belong to the temple. The said certificate has been issued by the Deputy Commissioner in his proceedings bearing No. 14810 of 1956, after an opportunity was given to the petitioner before us to put forth his contentions, if any, while he and others were resisting and preventing the temple from taking possession of the properties. On obtaining the certificate, an application has been filed before the District Magistrate, Cuddalore, for execution of the same. Before the District Magistrate the petitioner herein contended that he has not been the trustee but that his father was and, therefore, he did not come under section 87 of the Act ; and secondly, that the petitioner has been holding the lands as Inam burdened with service for performing the milk kattalai which has been regularly performed.

The learned District Magistrate overruled both these contentions and directed the temple being put in possession of the lands covered by the certificate, free of all obstruction by this petitioner and others. Hence this Revision Case.

On both the points I am of the same opinion as the learned District Magistrate and here are my reasons:

Point 1.—In advancing this argument, the terms of section 87 have been overs looked. Section 87 covers not only a trustee, office-holder or servant of the religiou- institution who has been dismissed or suspended from his office, *but also persons otherwise not entitled to be in possession* or any person claiming or deriving title from such trustee, office-holder, or servant, not being a person claiming in good faith to be in possession on his own account or on account of some person not being such trustee, officer-holder or servant. The section is comprehensive enough to take this petitioner. This point fails.

Point 2.—It is well settled that proceedings for delivery under section 87 of the Act are in the nature of execution proceedings by reason of the proviso contained in the section itself, which requires the Commissioner to hear the parties likely to be affected and consider their objections, if any, before issuing the certificate. It is also well settled law in this State that the executing Court has no jurisdiction to question the correctness, legality or propriety of the decrees which it is called upon to execute. A Court executing a decree cannot go behind the decree. It must take the decree as it stands. The Court executing a decree cannot alter, vary or add to the terms of the decree even by consent of parties : *Venkatasubba Rao* v. *G. Venkataramanayya*[1], *Muthia* v. *Veerammal*[2], *Venkatachala Reddi* v. *Venkatarama Reddi*[3], *Appa Rao* v. *Krishna Iyengar*[4], *Gomathi* v. *Komandur*[5], *Rangaswami* v. *Tirupathi*[6], *Kumaretta* v. *Sabapathy*[7], *Nathan* v. *Samson*[8]. Thus a District Judge moved under section 70 (2) of the Hindu Religious Endowments Act is in the same position as any other executing Court and is precluded from

1. (1948) 1 M.L.J. 56 : A.I.R. 1948 Mad. 397.
2. (1887) I.L.R. 10 Mad. 283 (F.B.).
3. (1901) I.L.R. 24 Mad. 665.
4. (1901) I.L.R. 25 Mad. 537.
5. (1903) I.L.R. 27 Mad. 118.
6. (1904) 14 M.L.J. 413 : I.L.R. 28 Mad. 26.
7. (1906) 16 M.L.J. 545 : I.L.R. 30 Mad. 26.
8. (1931) I.L.R. 9 Rang. 480. Notes of Unreported Cases (Madh. B.) 5639.

examining it on its merits but is bound to enforce it; *Lakshmindra Tirta Swamiar* v. *President of the Board of the Commissioners, H. R. E., Madras*[1], *President of the Board of Commissioners of H. R. E., Madras* v. *Lakshmindra Tirta Swamiar*[2], see also *Lanka Ramiah* v. *President, H. R. E. Board, Madras*[3], and *H. R. E. Board* v. *Koteswara*[4], *President, H. R. E. Board, Madras* v. *Nagarathina Mudaliar*[5], and *Mahadevudu* v. *President, H. R. E. Board, Madras*[6].

Happel, J., held in *Kinnayakka Ballal* v. *Narnappayya*[7], that an application for delivery under section 78 of the earlier Act (corresponding to section 87 of the present Act) was in the nature of an application for execution and it is not open to a person objecting to the application for delivery made under the Act to question the order of appointment of trustee who has made the application.

Satyanarayana Rao, J., who delivered the Judgment of the Division Bench in *Parankusam Ranganayakulu* v. *P. Venkatanarasimhayya*[8], expressed inability to concur in the opinion of Happel, J., on the ground that the order of the Board according to the law then embodied in the section contemplated no enquiry. The learned Judge stated that:

> "there would be considerable force in the contention that an application for delivery was in the nature of an application for execution, if there was a prior order of the Board between the parties holding that the property belonged to the temple or the trust."

He instanced the case of *Baijnath Sahai* v. *Ramgut Singh*[9], to show that the case before him lacked the elements to be found in the Privy Council case. That was a case where a certificate was issued by the Collector specifying the sum of arrears of revenue due and the person from whom it was due. The certificate was treated by reason of the language of section 7 of the Bengal Act VII of 1880 (Public Demands Recovery Act) as having the effect of a decree and proceedings in pursuance thereof as in the nature of execution proceedings. Similar provisions have been made in section 87 of the present Act.

The grounds on which the Division Bench refused to treat the order of the Board as a decree and an application for delivery as one in enforcement of the right given thereunder no longer exist.

Then there were two conflicting decisions of this Court one by Basheer Ahmed Sayeed, J., in *Vedantam Narasimhacharyulu* v. *P. Kotayya*[10], and another *Nallamuthu Chimpirayya, In re*[11], decided by me. Basheer Ahmed Sayeed, J., seemed to imply that section 87 permitted a summary enquiry and I held that no such enquiry was permissible, because the proceedings initiated under section 87 were in the nature of execution proceedings. It is true that I made some observations and defined the procedure to be adopted by the Magistrate which, on further reflection, I find are not warranted by the terms of the section, which requires the Magistrate only to find out whether the applicant has been appointed as a trustee or whether the properties included in the application are comprised in the certificate granted by the Commissioner. This was correctly pointed out in an article published at page 21 of the Journal section in (1952) 2 M.L.J. In these circumstances the papers were placed before the learned Chief Justice for the matter being posted before a Bench. The order of reference and the decision of the Bench to which I was a party are reported as *Pratipati Dandiah* v. *Venkatarama Dikshatulu*[12]. The Judgment of the Bench was delivered by Subba Rao, J., (as he then was) and he held that if the conditions of section 87 are complied with, the Magistrate is bound to direct delivery of the property and records to the applicant though the Archaka did not admit the title of the temple. *Parankusam Rangacharyulu* v. *P. Venkatanarasimhayya*[8], was dissented from and *Narasimhacharyulu* v. *Kotayya*[10], was overruled.

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1. (1932) 65 M.L.J. 364 : I.L.R. 56 Mad. 712.
2. (1934) 68 M.L.J. 200.
3. (1934) 68 M.L.J. 494.
4. (1937) 2 M.L.J. 413 : A.I.R. 1937 Mad 852.
5. (1935) 68 M.L.J. 549.
6. 1935 M.W.N. 984.
7. (1946) 2 M.L.J. 111.
8. (1949) 1 M.L.J. 200.
9. (1896) L.R. 23 I.A. 45 : I.L.R. 23 Cal. 775 (P.C.).
10. (1952) 2 M.L.J. 217.
11. (1952) 2 M.L.J. 441.
12. (1953) 2 M.L.J. 550.

Bearing these principles in mind, if we examine the facts of this case, we find that in these proceedings before the learned District Magistrate the contention that these lands are only burdened with service of milk kattalai cannot be gone into. The remedy of the petitioners is to file a civil suit, if so advised. This point also fails.

In the result, this Revision Case is dismissed.

P.R.N. ——— *Revision dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE RAJAGOPALA AYYANGAR.

Annamalai Ayee Chatram by Trustees, N.N.C. Ar. Rm. Arunachalam Chettiar and others .. *Petitioners**

v.

K. Ramabhadra Vandayar and others .. *Respondents.*

Tanjore Tenants and Pannayal Protection Act (XIV of 1952*), section* 13 (1) *and* (2) *and Madras Cultivating Tenants Protection Amendment Act (XIV of* 1956*), sections* 10 *and* 11*—Effect of later Act on proceedings under earlier Act.*

The territorial extent of the Tanjore Tenants and Pannayal Protection Act, 1952, was primarily restricted to the District of Tanjore and the operation of the Madras Cultivating Tenants Protection Act, 1955, as originally enacted, was confined to areas outside the area to which the Tanjore Act applied and has left the Tanjore Act wholly unaffected. But, by the Amending Act (XIV of 1956) the territorial operation of the Cultivating Tenants Protection Act, 1955, was extended to the whole of the State, including the area governed by the Tanjore Act. Section 10 of the Amending Act of 1956 clearly provides for the inter-relation between the provisions of the two enactments. Since the provision of the section 13 (2) of the Tanjore Act are not overridden by any contrary provision of the Cultivating Tenants Protection Act the provisions of sections 10 and 11 of the Amending Act of 1956 relating to transfer of proceedings cannot apply to cases under section 13 (2) of the Tanjore Act as there is no provision in the Act of 1955 corresponding to section 13 (2) of the Act of 1952. The appellate jurisdiction of the Revenue Court under section 13 (2) of the Tanjore Act is not therefore in any way affected by the Madras Act XIV of 1956. Similarly a vested right of appeal under section 13 (2) of the Tanjore Act to the Revenue Court from a decision of the Conciliation Officer, is a vested right which cannot be taken away by the mere fact that section 11 (2) of the Madras Cultivating Tenants Protection (Amendment) Act (XIV of 1956) superseded the powers of the Conciliation Officer under section 13 (1) of the Tanjore Act. If at the commencement of the Amending Act any proceedings under section 13 (1) of the Tanjore Act were pending they would be disposed of by the Revenue Divisional Officer under the later Act. But where no such proceedings were pending but were disposed of before the new Act, the right of appeal under the original Act cannot be taken away, though the claim as to restoration to possession by a cultivating tenant under section 13 (1) of the Tanjore Act is also covered by section 4 of the Cultivating Tenants Protection Act.

Petition praying that in the circumstances stated therein and in the affidavit filed therewith the High Court will be pleased to call for the records in L.Dis. No. 317-56-B, dated 23rd October, 1956, on the file of the Revenue Court, Kumbakonam, and to issue a writ of *mandamus* directing the Revenue Court, Kumbakonam, to entertain the appeal and dispose of it according to law.

D. Ramaswami Ayyangar, T. R. Srinivasan and *O. K. Ramalingam*, for Petitioners.

The Additional Government Pleader (*K. Veeraswami*), *T. S. Kuppuswami Ayyar* and *K. S. Naidu*, for Respondents.

The Court delivered the following

JUDGMENT.—These three petitions have been heard together as they raise a related point as regards the effect and construction of the Madras Cultivating Tenants (Amendment) Act, XIV of 1956. The precise questions involved in the Writ Petition and in the Civil Revision Petitions are slightly different and they would therefore, be dealt with separately. I shall first deal with W.P. No. 39 of 1957.

The petitioners are landlords in the District of Tanjore in their character as trustees of a chatram charity which owns about 42 acres of wet lands. These lands

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* W.P. No. 39 of 1957. (C.R.Ps. Nos. 45 and 46 of 1957.) 18th December, 1957.

were leased to certain persons who were cultivating tenants as defined by the Tanjore Tenants and Pannaiyal Protection Act (XIV of 1952) which I shall hereafter refer to as the Act. The tenants filed on 26th June, 1956, a petition before the Conciliation Officer, Kumbakonam, under section 13 (1) of the Act invoking the jurisdiction of the Officer to settle their dispute with their landlords as regards certain remissions of rent which they claimed, based on the poor harvest of the land leased to them and also a further claim to deduction for the cost of the manure put in by them. The Conciliation Officer held on enquiry and recorded findings which in a large measure gave relief to the tenants. This order was passed on 20th September, 1956. Section 13 (2) of the Act enacted :

> "Against any final order passed by a Conciliation Officer under sub-section (1) an appeal shall lie to the Revenue Court within thirty days of the passing of the order unless the court in special circumstances of any case condones, the delay in preferring the appeal within that time ; and the decision of the Revenue Court on such appeal shall be final."

Seeking to avail themselves of the remedy thus conferred the landlords filed an appeal on 18th October, 1956, to the Revenue Court constituted under the rules by the Revenue Divisional Officer, within the time limited by law. The Revenue Court, however, refused to entertain the appeal and returned the memorandum of appeal holding that its jurisdiction was barred by the provisions of Act XIV of 1956. It is the correctness or the legality of this order that is challenged in the Writ Petition. The order of the Revenue Court which is challenged before me is very short and the only reason given for holding its jurisdiction barred is by a reference to section 11 (2) of Act XIV of 1956. Before dealing with the enactment just now mentioned it would be necessary to refer to an intermediate enactment which has relevance to the question now under consideration—Act XXV of 1955.

The territorial extent of the Tanjore Act was primarily the District of Tanjore, though power was reserved to the State Government to extend its provisions to adjoining districts. This was followed by Act XXV of 1955—The Madras Cultivating Tenants Protection Act, 1955, an enactment whose territorial operation was confined to areas outside *inter alia*, the areas to which the Tanjore Act applied (section 1 (2) (iii)).

This 1955 Act was, compared to the Tanjore Act, less elaborate. Its operative sections were only two—section 3 protecting cultivating tenants against eviction, except for stated reasons and by application to the Revenue Divisional Officer and section 4 which conferred on cultivating tenants a right to be restored to possession—again subject to conditions and by application to the Revenue Divisional Officer of the area. It would thus be apparent that the Cultivating Tenants Protection Act, 1955, left wholly unaffected the provisions of the Tanjore Tenants and Pannayal Protection Act.

The next piece of legislation relevant to the present context is the Madras Act XIV of 1956. The Cultivating Tenants Protection Amendment Act, 1956, which having received the assent of the President was published in the Official Gazette on 1st October, 1956. By its section 2, sections 1 and 2 of the Cultivating Tenants Protection Act of 1955 were amended by extending the territorial operation of the Act of 1955 to the whole of the State of Madras other than the areas to which the Malabar Tenancy Act, 1929 (XIV of 1930) extends. This of course, meant the extension of the 1955 Act to areas governed by the Tanjore Act and the result of this was that the right of the landlord to evict cultivating tenants even in areas governed by the Tanjore Act came to be regulated by the provisions of the Cultivating Tenants Protection Act, 1955. Consequential changes were, therefore, necessary in the Act of 1955 to bring this provision into line with the rest of the Act. Accordingly changes were made in section 3 of the Cultivating Tenants Protection Act, 1955, in regard to the newly brought in tenants (*vide* section 4 of Act XIV of 1956). Section 10 specifically referred to the inter-relation between the provisions of the Tanjore Tenants and Pannaiyal Protection Act and the Cultivating Tenants Protection Act and enacted ;

"If any provision contained in the Tanjore Tenants and Pannaiyal Protection Act, 1952 (Madras Act XIV of 1952) is repugnant to any provision contained in the Principal Act as amended by this Act, the latter provision shall prevail and the former provision shall, to the extent of the repugnancy be of no effect."

Stopping here, the position can be summarised thus in relation to the matter now on hand. The application filed before the Conciliation Officer by the Cultivating Tenants in this case was to seek an adjudication as regards a claim to a remission of the rent which should be justly allowed to them owing to unfavourable seasons. No jurisdiction was conferred in any officer for dealing with such matter under the Cultivating Tenants Protection Act, 1955, as amended with the result that the provisions contained in section 13 (1) of the Tanjore Act were not overriden by any contrary provision contained in the Madras Act XXV of 1955 as originally enacted or even as amended by Act XIV of 1956. It would follow if one is right so far, that from an order passed by the Conciliation Officer under section 13 (1) the right of appeal for which provision was made to the Revenue Divisional Officer under section 13 (2) still continued to be available to the aggrieved party, be he the landlord or the tenant. There was nothing in Act XIV of 1956 read with Act XXV of 1955 affecting or negativing this right of appeal conferred by the Tanjore Tenants and Pannayal Protection Act, 1952.

Now we go to section 11 of the Act XIV of 1956, on the basis of which the appeal of the landlord has been rejected by the Revenue Divisional Officer. This section reads :

" (1) Any application made to a Conciliation Officer under the Tanjore Tenants and Pannayal Protection Act, 1952 (Madras Act XIV of 1952) and pending on the date of coming into force of this Act 1st October, 1956) shall, if it relates to a matter falling within the purview of the principal Act as amended by this Act, be transferred to and disposed of by the Revenue Divisional Officer who would have had jurisdiction to entertain such application under the principal Act as if it had been made thereunder.

(2) All proceedings pending with the Revenue Court on the date of coming into force of this Act shall be disposed of by that Court as if this Act had not been passed."

In my judgment far from supporting the construction put upon the provision by the Revenue Court, its terms point to just the opposite conclusion. In saying this, I have in mind the words in sub-section (1) "*shall if it relates to a matter falling within the purview of the principal Act*" as amended by the Act of 1956. The matters dealt with by the Madras Act XXV of 1955 were those in relation to eviction of tenants and restoration of tenants. The further provision introduced by the Amending Act of 1956 was as regards the resumption of lands by landlords for their personal cultivation. It was only if there was any provision in the Tanjore Tenants and Pannayal Protection Act, 1952, bearing on any of these three matters, that there was any supersession of these provisions under section 10 and there was a transfer to the new authority under section 11. Section 11 was obviously designed to carry out the principle laid down in section 10, *viz.*, of supersession by the later enactment where the provisions of the two Acts overlapped. Obviously there was no overlapping in regard to a claim for remission of rent under section 13 (1) with the result that section 10 of Act XIV of 1956 left section 13 of the Tanjore Tenants and Pannayal Protection Act in this respect unaffected and similarly section 11 (1) would have been inapplicable to such cases.

Coming to sub-section (2) of section 11 a positive provision directing the Revenue Court to dispose of proceedings pending before it on 1st October, 1956, cannot be construed as statutory prohibition against the Revenue Divisional Officer as the Rent Court under section 13 (2) of the Tanjore Act entertaining any proceedings after that date. The bar to the jurisdiction which was vested by section 13 (2) of the Tanjore Act must be founded on express enactment and as I have stated earlier section 13 (2) continued to be operative and in full force throughout its territorial extent until the enactment of Act XIV of 1956 on 1st October, 1956 and even then except in regard to particular matters with the result that the petitioner's appeal was properly filed to the Revenue Court and should have been disposed of by it. There was no basis for holding that section 11 of the Act XIV of 1956 deprived the Revenue Court—Revenue Divisional Officer—of any jurisdiction to entertain the appeal or

to decide it. There is one other piece of legislation which has some bearing on the matters now in controversy but it came into effect after the order of the Revenue Divisional Officer in this case. The Tanjore Tenants and Pannayal Protection Act, 1952, was amended by the Madras Act XXV of 1956 so as to confine the principal enactment to pannayals, removing therefrom all reference to cultivating tenants. This came into force on 31st October, 1956. What the effect of this repeal would be if this Act had been in force, after the order of the Conciliation Officer and before appeals were filed to the Revenue Court, it is unnecessary to consider. In the present case an appeal had been filed to the Revenue Court before 31st October, 1956 and so notwithstanding the repeal of the relevant provisions of the Tanjore Tenants and Pannaiyal Protection Act, 1952, the jurisdiction of the appellate authority would continue in respect of pending proceedings.

In my judgment the appeal of the petitioners was properly before the Revenue Divisional Officer and his order returning the memo. of appeal was illegal. His order is set aside and the rule is made absolute. The appeal will be restored to his file and will be disposed of according to law. There will be no order as to costs in this Writ Petition.

C.R.P. Nos. 45 *and* 46 *of* 1957. These two Civil Revision Petitions arise out of applications by the tenants to the Conciliation Officer under section 13 (1) by tenants governed by the Tanjore Tenants Act, 1952. There were two applications M.P. Nos. 122 and 123 of 1956 and as the facts were common to both the applications they were tried together by the Conciliation Officer, evidence being recorded in one. The case of the tenants was that they had been in possession of their holdings from a period anterior to the Tanjore Tenants Act, 1952, and that they were entitled under the provisions of that Act to be continued in possession for a period of five years under section 6 (1) thereof which enacted that

"Every cultivating tenant who was in possession of any land on the 1st day of December, 1951, shall be entitled to be in possession thereof as such tenant until the expiry of a period of five years from the commencement of the agricultural year 1952-53".

Thus far there does not appear to have been any controversy between the tenants and their landlords. The tenants, however, stated that at the commencement of the agricultural year 1956 the landlords unlawfully and by force deprived them of the possession of their holdings, and they sought the aid of the Conciliation Officer, by the applications under section 13 (1) of the Act for being restored to possession. The landlords denied any eviction by them and pleaded that the tenants voluntarily surrendered possession of their holdings at the end of the agricultural year 1955-56 and that thereafter the landlords had the lands cultivated by themselves without reference to these tenants. This application was filed to the Conciliation Officer long before the Act XIV of 1956 was enacted. The Conciliation Officer enquired into the matter and finding the case of the tenants proved, passed an order on 20th September, 1956, directing the landlords to restore the tenants to possession. Under section 13 (2) of the Act, whose terms I have extracted earlier, the landlords filed appeals to the Revenue Court, Revenue Divisional Officer, on 1st October, 1956 and the Revenue Court rejected these appeals by its order, dated 25th October, 1956, as barred by section 11 (2) of the amending Act XIV of 1956. The landlords have filed these Civil Revision Petitions questioning the legality of the orders of the Revenue Court. It will be seen that there is some slight difference between the matters involved in W.P.No. 39 of 1957 and in the Civil Revision Petitions. Act XIV of 1956 extended the operation of the Cultivating Tenants Protection Act, 1955, to areas governed by the Tanjore Tenants Act. Section 10 of the amending Act enacted that if any provisions of the Tanjore Tenants Act, 1952, were repugnant to provisions contained in the principal Act as amended by Act XIV of 1956 the later provision shall prevail.

The Writ Petition was concerned with the claim to remission of rent, a relief not covered by the Cultivating Tenants Protection Act but the point involved in the Civil Revision Petitions is as regards restoration to possession and this is a matter in regard to which provision is made by section 4 of the Cultivating Tenants Protection Act, 1955. Section 4 enacted that

"every cultivating tenant who was in possession of any land on the 1st December, 1953 and who was not in possession thereof at the commencement of that Act"

(namely, 29th September, 1955) could apply to the Revenue Divisional Officer for restoration to possession. Bearing in view the dates specified section 4 as just now extracted would not apply but this section was amended by the insertion of a new sub-section (5), by Act XIV of 1956, which ran :

"(Any cultivating tenant who after the commencement of this Act (*i.e.*, 1st October, 1956) has been evicted except under the provisions of sub-section (4) of section 3 shall be entitled to apply to the Revenue Divisional Officer within two months from the date of such eviction or within two months from the date of coming into force of the Madras Cultivating Tenants Protection (Amendment) Act, 1956, for the restoration to him of the possession of the lands from which he was evicted and to hold them with all the rights and subject to all the liabilities of a cultivating tenant."

The eviction complained of in the present case was within sub-section (5) and was after the commencement of the Act (29th September, 1955). If, therefore, the tenants had waited till 1st October, 1956, when Act XIV of 1956 came into force they could have filed applications under section 4 (5) of the 1955 Act.

They had, however, filed applications to the Conciliation Officer before that date. If the proceedings had been pending before the Conciliation Officer uptill 1st October, 1956, these proceedings would have by virtue of section 11 (1) of Act XIV of 1956, stood transferred to the Revenue Divisional Officer for disposal. But they had been disposed of by the Conciliation Officer before that date and he passed his order before 1st October, 1956.

The question that has now to be considered in this context is as to the effect of the supersession of the provision in section 13 (1) of the Tanjore Tenants and Pannayal Protection Act as regards a claim to restoration of possession by section 4 (5) of the Cultivating Tenants Protection Act introduced by Act XIV of 1956 on the rights of the aggrieved party. The Revenue Court has held that section 11 (2) did not apply. The appeal from the order of the Conciliation Officer was filed on 1st October, 1956 and the Act XIV of 1956 also came into force on 1st October, 1956. One possible view to take would be that as the law does not in general take into account fractions of a day, the appeal filed on 1st October, 1956, should be deemed pending on that date when the 1956 Act came into force, so as to bring the appeal within the scope of section 10 (2). It is unnecessary to canvass the correctness of the view but I might observe that the inclination of my opinion is that the appeal was not pending before the Revenue Court at the commencement of the Act, since the Act was in force from after the midnight of 30th September, 1956. This, however, does not conclude the point. Under section 13 (2) of the Tanjore Act, 1952, the petitioner had a vested right to appeal and canvass the correctness of any decision of the Conciliation Officer should it go against him. In the absence of any positive provision depriving him of his right, he would be entitled to exercise it. The mere supersession of the provisions of section 13 (1) by which the jurisdiction of the Conciliation Officer became vested in the Revenue Divisional Officer under section 4 (5) of Act XXV of 1955 did not by itself operate to put an end to this right. I have already pointed out that the grant of a positive power to the Revenue Court —Revenue Divisional Officer—to proceed with matters pending before it under section 11 (2) cannot be construed as a prohibition that if the matter was not already pending, he was deprived of jurisdiction to entertain the appeal. Of course, the jurisdiction was not conferred by Act XIV of 1956 depriving the parties of their statutory right of appeal which they possessed under section 13 (2) of the Tanjore Act. In this connection I might usefully refer to the decision of the Supreme Court in *Veeraya* v. *Subbiah Chowdhury*[1], where their Lordships dealt with the right of appeal conferred by sections 109 and 110 of the Civil Procedure Code in relation to the right of appeal conferred by Article 133 of the Constitution.

I therefore hold that the appeal filed by the petitioners before the Revenue Court was properly entertainable by it and that the orders rejecting them are not

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1. (1957) 2 M.L.J. (S.C.) 1 : 1957 S.C.J. 489 : (1957) 2 An.W.R. (S.C.) 1.

legal. The two Civil Revision Petitions are, therefore, allowed and the orders of the Revenue Divisional Officer set aside.

The Revenue Court will restore the appeals to its file and dispose of them in accordance with law. No order as to costs.

R.M. ——— *Petitions allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE RAJAGOPALA AYYANGAR.

M. G. Mukundaraja Ayyangar .. *Petitioner**

v.

State of Madras, by Collector of Ramanathapuram, at Madurai and another .. *Respondents.*

Madras Estates (Abolition and Conversion into Ryotwari) Act (XXVI of 1948)—Notification under—Effect of—Inam village forming part of parent estate—Vesting in Government—Government treating village as under-tenure or intending to take it over as such—Effect of.

Where an estate is notified under section 1 (4) of the Madras Estates (Abolition and Conversion into Ryotwari) Act, 1948, an inam village in the estate would also vest in the State under section 3 (*b*) of the Act. The effect of the Notification of the parent estate is that the inam village also vests in the Government as part of the notified estate. There is no principle of law by which the statutory effect of the Notification can be cut down or whittled down by a reference to the intention or supposed intention of the notifying authority.

The fact that the Government committed a mistake in treating a hamlet as an under-tenure or that the Government intended to take over the hamlet as an under-tenure would not detract from the original intention to take it over; nor would the Government be disabled or disentitled on that account from relying on the notification of the parent estate as sufficient to clothe them with authority to treat the hamlet as having been vested in them.

State of Madras v. *Srinivasa Ayyangar*, (1956) S.C.J. 89: (1956) 1 M.L.J. (S.C.) 63: (1955) 2 S.C.R. 902 : (1956) An.W.R. (S.C.) 63, followed.

Petition under Article 226 of the Constitution of India praying that in the circumstances stated therein, and in the affidavit filed therewith the High Court will be pleased to issue a writ of *mandamus* directing the respondents not to take any proceedings under sections 11 and 15 or of any other provision of the Madras Act XXVI of 1948 with regard to the Veyinipatti *alias* Rayinipatti hamlet in the village of Soorakulam, Sivaganga Taluk, Ramanathapuram District.

A. Sundaram Iyer, for Petitioner.

The Additional Government Pleader (*K. Veeraswami*), for Respondents.

The Court made the following

ORDER.—In this application for the issue of a writ of *mandamus* the petitioner prays for the issue of directions injuncting the respondents from taking proceedings under the provisions of Act XXVI of 1948 with regard to the village of Veyinipatti *alias* Rayinipatti. The petitioner is the owner of this village which was granted on a permanent cowle by the then Zamindarini of Sivaganga to two individuals. There were successive devolutions in the title to this village, the petitioner being the last of such purchasers.

The complications which have led to the present petition have been due to the misunderstanding on the part of the State Government in regard to the tenure of this village. After the Madras Estates (Abolition and Conversion into Ryotwari) Act, 1948, was passed and was brought into force the Government published a Notification on 11th August, 1949, notifying *inter alia* the zamindari estate of Sivaganga. The text of this Notification ran :

" In exercise of the powers conferred by section 1 (4) of the Madras Estates (Abolition and Conversion into Ryotwari) Act, 1948 (Madras Act XXVI of 1948), His Excellency the Governor of Madras hereby appoints the 7th day of September, 1949, as the date on which the provisions of the said Act other than. . . . . shall come into force in the zamindari estates specified in the Schedule below :

* Writ Petition No. 858 of 1956. 16th September, 1957.

As already mentioned Sivaganga estate was one of the items set out in the Schedule. Subsequently another Notification G.O. Ms. No. 2159 (Revenue), dated 22nd August, 1949, was published appointing 7th September, 1949, as the date on which the provisions of the Act would come into force in respect of the under-tenure estate specified in the Schedule to the notification. The village of Veyinipatti was specified as item No. 42 of the under-tenure estates within the parent estate of Sivaganga. There was also a separate notification under Act XXX of 1947 in relation to this village as an under-tenure. The compensation amount in regard to the main estate as well as the village of Veyinipatti was also calculated on the basis of their being separate entities and interim payment on the basis of the compensation thus arrived at was also made before the Abolition Tribunal.

At this stage the petitioner filed a petition in the High Court invoking its jurisdiction under Article 226 of the Constitution for quashing the Notification G.O. Ms. No. 2159 (Revenue), dated 22nd August, 1949, notifying the village as an under-tenure estate on the ground of its being illegal. This writ petition was disposed of by this Court on 11th September, 1953 and on the finding that Veyinipatti was not an under-tenure estate the notification was quashed.

The State Government authorities, however, proceeded on the basis that the decision of this Court holding the notification of the village as an under-tenure was invalid, did not negative the position that the village was a part of the zamindari parent estate and called on the concerned parties to apply for pattas under the relevant provisions of Act XXVI of 1948. The land-owner, the petitioner, here, thereupon filed a petition before the Assistant Settlement Officer, Sivaganga, to drop these proceedings on the ground that there had been no specific notification of this village under section 1 (4) of the Abolition Act so as to attract the other provisions of the enactment to this village. This petition, however, was subsequently withdrawn by the petitioner on 13th February, 1956. The petitioner in his affidavit in support of this petition, states that he withdrew this petition before the Assistant Settlement Officer because he had been informed by the Assistant Settlement Officer that there had been a specific Notification by Government on 13th November, 1954, under section 1 (4) of the Abolition Act. He further states that on examination he found that this information was incorrect and that there had been no such notification specifically referring to this hamlet. He has therefore filed the present petition praying for the relief which I have set out in the opening portion of the judgment. This petition was filed in April, 1956 and subsequent thereto the Government issued a Notification, dated 31st May, 1956, formally deleting Veyinipatti from the list of under-tenure villages notified in G.O. Ms. No. 2159 (Revenue), dated 22nd August, 1949. This last Notification, it would be seen, merely gave effect to the decision of this Court in the writ petition filed by the petitioner and has really no relevance for deciding the points arising in this petition.

It has now fairly to be conceded that Veyinipatti was and continued always to be part of the parent estate of Sivaganga. The question is really concluded by the decision of the Supreme Court in the *State of Madras* v. *Srinivasa Ayyangar*[1], where the Court held that when a darmila inam does not relate to the entire village but only to a fraction of it, it must be held to retain its character as part of the estate in the hands of the inamdar and when the estate is notified under section 1 (4) of the Act the inam will vest in the State under section 3 (*b*) ; if the only notification issued in the present case was that relating to the parent estate of Sivaganga, there can be no controversy that the village of Veyinipatti would have vested in the Government as part of the Sivaganga estate. The contention, however, raised by Mr. Sundaram Ayyar was that in notifying the Sivaganga estate the Government must be taken to have excluded the hamlet of Veyinipatti specified in the other Notification G.O. Ms. No. 2159, dated 22nd August, 1949, as an under-tenure estate. The argument was that the two notifications must be read together and that if so read, the intention of the Government when they notified the taking over of the Sivaganga estate must

1. (1956) S.C.J. 89 : (1956) 1 M.L.J. (S.C.) 63 : (1956) An.W.R. (S.C.) 63 : (1955) 2 S.C.R. 903.

be to take over only that portion of the Sivaganga zamindari which was not comprehended by the other Notification in relation to the under-tenures. Learned counsel urged that if the Government had specifically excluded particular areas out of the zamin estate from the operation of the Notification the Government would have no right over the areas thus excluded and that the resulting position arising from the existence of these two Notifications ought in law to be the same.

It is unnecessary to decide in this case as to whether the Government have the right under the terms of Madras Act XXVI of 1948 to notify only parts of a zamindari estate excluding areas which are the intergral parts of it from the operation of the enactment. But that, however, is not the position in the present case. The G.O. Ms. No. 2093 (Revenue), dated 11th August, 1949, notified the entire Sivaganga estate as a zamin estate which was taken over and if on the terms of the Notification the hamlet now in question would have been comprehended I do not see any principle of law by reason of which such effect could be cut down. Learned counsel stressed that what the Court must look at was the intention of the Government and that that intention should be gathered in the present case by looking at the two notifications which were to come into effect on the same date. I am, however, of the view that the statutory effect of notifiying the entire estate of Sivaganga as a zamin estate to be taken over cannot be whittled down by reference to the intention or the supposed intention of the notifying authority. If it were permissible to speculate on the intention of the Government one thing is clear, namely, that they intended to take over Veyinipatti. The fact that they intended to take over this hamlet as an under-tenure does not in my opinion detract from that intention which was to take it over. Undoubtedly the Government committed a mistake in treating this as under-tenure but they are not on that account disabled from relying on the notification of the Sivaganga zamin as sufficient to clothe them with authority to treat this hamlet as having been vested in them.

In my judgment the position taken up by the Government and the Estate Abolition Authorities that the hamlet stood vested in the Government by reason of the Notification of the parent estate of Sivaganga is correct. The petition fails and is dismissed and the rule discharged. There will, however, be no order as to costs.

P.R.N. ——— *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE SUBRAHMANYAM.

Tha. Duraiswami Naidu .. *Appellant**

v.

Krishnappa Naidu .. *Respondent.*

Arbitration Act (X of 1940), section 32—Arbitration award—Bar of suit under—Applicability.

The word ' award ' in section 32 of the Indian Arbitration Act has to be read as referring only to an award which may be filed in Court under section 14 of the Act and in accordance with which a decree may be passed under section 17 of the said Act. Only in case where such an award forms the basis of the relief claimed in the suit, section 32 will come into operation. The prohibition under that section cannot apply to suits based on an agreement entered into subsequent to an award, though the terms of such an agreement was endorsed on the award itself and the terms of the agreement may have to be ascertained from the award.

Moolchand Jothajee v. *Rashid Jamshed Sons & Co.*, (1946) 1 M.L.J. 185 : I.L.R. (1946) Mad. 840; *Bai Narbadabai* v. *Natwar Lal Chunilal*, I.L.R. (1953) Bom. 851, distinguished.

Appeal against the Decree of the District Court of North Arcot at Vellore in A.S. No. 290 of 1953, preferred against the Decree of the Court of the District Munsif of Ranipet in O.S. No. 290 of 1950.

K. Kalyanasundaram, for Appellant.

V. V. Raghavan, for Respondent.

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*Second Appeal No. 72 of 1955. 26th September, 1957.

The Court delivered the following

JUDGMENT.—The plaintiff in O.S. No. 290 of 1953 on the file of the District Munsif, Ranipet, is the appellant in this Second Appeal.

The suit was for specific performance of a contract of sale entered into by the defendant-respondent and for possession of the property agreed to be conveyed. The plaintiff alleged that on 25th December, 1949, he and the defendant entered into an agreement that, in consideration of the plaintiff giving up certain debts owing to him by the defendant and his father, and the plaintiff conveying to the defendant a half share in a site, the defendant would convey the suit property to the plaintiff by a registered sale deed before 12th June, 1950.

The defendant denied the alleged agreement. He pleaded that the plaintiff had taken his signature fraudulently on some documents.

During trial, the agreement alleged in the plaint was sought to be proved by filing the arbitration agreement, Exhibit A-1, a decision or award by some of the arbitrators, Exhibit A-1 (*a*) and the endorsement made on that decision by the plaintiff and the defendant.

The learned District Munsif found that the defendant's signatures which appeared in the abitration agreement and in the endorsement made on the award were taken under duress, without disclosing to him the contents of those documents. The District Munsif held that the agreement set up in the plaint was neither true nor valid and dismissed the suit.

In appeal, the learned District Judge held that it was not necessary to go into the question whether the signatures of the respondent appearing in the arbitration agreement and in the endorsement on the award had been taken in circumstances of duress and fraud. Issue 4 framed in the suit was, whether the suit as framed was maintainable? That was the only issue which, according to the learned Judge, needed consideration. He said that, even assuming that the arbitration agreement and the award were valid and binding on both parties, the suit was barred by section 32 of the Indian Arbitration Act. For that proposition, he relied on *Moolchand Jothajee* v. *Rashid Jamshed Sons and Co*[1]. It was strenuously urged before him that the plaintiff was not seeking relief on the basis of the arbitration agreement, or the award and that the relief sought was enforcement of the agreement that had been endorsed on the decision or the award. In regard to that argument, namely, that the endorsement made on the "award" formed a separate, enforceable contract, which was not hit at by the provisions of section 32, the learned Judge said that the endorsement created no independent rights or obligations and that any attempt to enforce that endorsement would necessarily bring into question the existence of the award, the terms of the award and their validity, and that an investigation of those questions was barred by section 32 of the Indian Arbitration Act. In that view, the learned appellate Judge held that the suit was not maintainable and dismissed the appeal.

The point for determination is whether the suit is barred under section 32 of the Indian Arbitration Act.

Section 32 of the Arbitration Act enacts :

> "Notwithstanding any law for the time being in force, no suit shall lie on any ground whatsoever for a decision upon the existence, effect or validity of an arbitration agreement or award."

Section 2 (*a*) of the Act states that an award means an arbitration award. To ascertain what an arbitration award is, we should turn to section 14 of the Act. It says:

> "(1) where the arbitrators or umpire have made their award, they shall sign it and shall give notice in writing to the parties of the making and signing thereof. . . . . . (2) The arbitrators or umpire shall, at the request of any party to the arbitration agreement or any person claiming under such party or if so directed by the Court and upon payment of the fees and charges due in respect of the arbitration and award and of the costs and charges of filing the award, cause the award or a

1. (1946) 1 M.L.J. 185 : I.L.R. (1946) Mad. 480.

signed copy of it, together with any depositions and documents which may have been taken and proved before them, to be filed in Court, ..."

The Court may, under section 17 of the Act, pronounce judgment and pass a decree in accordance with the award.

The word 'award' in section 32, has in my opinion, to be read as referring only to an award which may be filed in Court under section 14 and in accordance with which a decree may be passed under section 17. Section 32 can be invoked in regard only to a suit in which an award, which may be filed in Court under section 14, forms the basis of the relief claimed.

Let us take a case where an award is validly made by arbitrators appointed under an arbitration agreement. Let us suppose that, after the award is made, the parties to the agreement consider the award not completely satisfactory, and endorse on the award an agreement that they would abide by the terms of the award, subject to the modifications set out in that endorsement. If, thereafter, one of the parties resiles from the agreement endorsed on the award, would a suit lie to enforce the agreement? The answer is clearly in the affirmative. The award itself cannot be filed in Court, because it has been superseded by the agreement endorsed on the award. But the award would have to be proved for the purpose of proving the terms of the agreement. The agreement endorsed on the award would be un-understandable, without the award being read. The suit, in such a case, is based on the agreement endorsed on the award, and the validity of the plaintiff's claim would in no way be dependent on the validity of the award. To a case of that kind, the prohibition enacted under section 32 of the Act can have no application.

Let us take a case where, by an arbitration agreement signed by *A* and *B* three persons, *X*, *Y* and *Z* are appointed arbitrators to decide certain disputes between them. Let us suppose that *A* and *B* write to *X*, *Y* and *Z* telling them that they might decide the disputes on the basis of the documents sent to them and that no further evidence need be taken and that no oral hearing is necessary. Let us suppose further that *Z* finds it inconvenient to act as arbitrator, and that *X* and *Y* alone in good faith act as arbitrators (without the arbitration agreement being modified so as to constitute them the sole arbitrators) to the exclusion of *Z*, and that they pass an award and send copies of it to *A* and *B*. As an award, the decision is of no effect. But let us suppose that the decision given by *X* and *Y* gives complete satisfaction to *A* and *B*, and that they, knowing that the decision is void as an award make an endorsement on the 'award' that they would abide by it and act in accordance with its terms. The 'award' of its own force cannot give rise to any rights or obligations as between *A* and *B*. But the agreement endorsed on the award can. Section 32 does not, in my opinion, bar a suit to enforce the agreement endorsed on the 'award'. The prohibition enacted in section 32 cannot be invoked except where the arbitration agreement or the award forms the basis of the relief claimed in the suit. The prohibition cannot, in particular, be invoked where, on the allegations made in the plaint, the plaintiff's right to relief is not to any extent dependent upon the validity of the alleged arbitration agreement or award.

In support of the position that the appellant's suit was barred by section 32, the learned District Judge relied on the ruling in *Moolchand Jothajee* v. *Rashid Jamshed Sons and Co*[1]. The plaintiff's claim in that suit was based on the allegation that the award had become final, conclusive and binding on the parties. They asked for a decree in terms of the award. There can be no doubt, if I may say so with great respect, that a suit of that kind is barred by section 32.

Similarly in *Bai Narbadabai* v. *Natvar Lal Chunilal*[2], it was conceded that the suit was filed to enforce an award (see page 859) of the Report. On that statement of the plaintiff's case the learned Chief Justice held that the suit was

1. (1946) 1 M.L.J. 185 : I.L.R. (1946) Mad. 480. 2. I.L.R. (1953) Bom. 851.

clearly not a suit to enforce an agreement which was in any way independent of the award.

In the case before us, the suit was not to enforce an award. It was to enforce an agreement whose terms had to be ascertained by reading a document which was called an award. The arbitration agreement, Exhibit A-1, purports to refer the disputes between the parties to the arbitration of thirteen persons including the writer, Doraisami. The arbitration agreement says that the parties would be bound by any decision which might be given by the arbitrators unanimously. The arbitrators, who have signed the decision, Exhibit A-1 (*a*) are ten including the writer, Doraisami. The decision, therefore, was not an award capable of being filed under section 14, or giving rise to rights or obligations as between the parties to the agreement. On that decision or ' award ' the parties made an endorsement that they with one mind accepted the decision. If the defendant signed that endorsement freely and voluntarily consenting to the terms of the document referred to as the 'decision' and knowing that it was not enforceable as an award, then, the suit to enforce that agreement would be maintainable. On the questions whether that endorsement was made by the defendant freely and voluntarily and with full knowledge of all the relevant facts, and whether the Court should exercise its discretion under the Specific Relief Act to enforce the agreement, no findings have been given by the learned District Judge.

The judgment and decree of the District Judge are set aside. He will restore the appeal to its original number on his file and dispose of it afresh in the light of the observations made above. The Court-fee paid on the memorandum of Second Appeal will be refunded to the appellant. The respondent will pay the appellant the rest of his costs.

Leave granted.

R.M. ——— *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. P. V. RAJAMANNAR, *Chief Justice* AND MR. JUSTICE PANCHAPAKESA AYYAR.

The Special Tahsildar, Harijan Welfare, Kumbakonam, Land Acquisition Collector .. *Appellant**

v.

S. Vaidyanatha Ayyar .. *Respondent.*

Land Acquisition Act (*I of* 1894), *section* 23 (1), Fourthly—*Injuriously affecting property—Acquisition for building houses for persons owning cattle—Probable damage to crops on claimant's adjacent property by the cattle—Cost of fence in determining compensation under the Act.*

By reason of the acquisition of a part of the claimant's property for the building of houses to persons owning cattle, there is every likelihood of the cattle kept by them straying on to the adjacent land of the claimant covered with crops and causing damage to them. The award of a sum for the cost of the fence is proper and justified and the sum could be awarded under section 23 (1), *Fourthly* of the Act, namely, the damage, if any, sustained by the person by reason of the acquisition injuriously affecting his other property.

Appeal under section 54 of the Land Acquisition Act against the Decree of the Court of the Subordinate Judge, Kumbakonam, in O.P. No. 11 of 1952.

The Government Pleader (*B. V. Viswanatha Ayyar*) and *V. Srinivasan*, for Appellant.

K. Rajah Ayyar and *S. Krishnamurthi*, for Respondent.

The Judgment of the Court was delivered by

Rajamannar, C.J.—This appeal and the memorandum of cross-objections arise out of an acquisition of an area of 2-52 acres out of a block of 7 acres odd in the village of Vinayakatheru in Tanjore District belonging to the respondent before us, for the purpose of providing house-sites for Harijans. The notification

* Appeal No. 412 of 1953. 6th September, 1957.

under section 4 relating to the acquisition was published on 31st July, 1951. The Land Acquisition Officer awarded compensation at the rate of Rs. 750 per acre mainly on the basis of a sale deed, Exhibit B-1, dated 23rd June, 1948, under which land was conveyed at Rs. 600 per acre. The claimant, who was dissatisfied with the compensation awarded to him asked for a reference to Court, which was made. The learned Subordinate Judge of Kumbakonam who dealt with the reference enhanced the compensation to Rs. 2,000 per acre. The claimant also prayed for the award of a sum of Rs. 1,500, being the cost of putting up a fence to mark off the rest of his land from the acquired portion, to prevent the cattle of the Harijans who were to be housed in the acquired portion from straying into his land and spoiling and damaging his crops. He also made a claim for damages on account of severance. But that was not pressed either in the Court below or before us. The learned Judge awarded a sum of Rs. 500 for the cost of the fence. The Government represented by a Special Tahsildar, Harijan Welfare, Kumbakonam, have filed the above appeal. They object to the enhancement of the rate of compensation for the land and also to the award of Rs. 500 towards the cost of the fence. The claimant has preferred a memorandum of cross-objections claiming more than what had been granted by the learned Subordinate Judge.

The acquired land is assessed dry land. There is evidence that on an extent of 50 cents out of this area there was sugarcane cultivation. On the rest of the land there was punja cultivation partly on *pannai* and partly by tenants of the claimant under leases. The claimant adduced before the learned Subordinate Judge evidence of the income derived from the acquired land. He filed his accounts which related not only to the acquired land but also to the entire block of 7 acres odd. According to him, for fasli 1360 he derived a net income of Rs. 1,030-9-9 for the entire cultivated land and he claimed that the compensation must be based on the proportionate income in respect of the acquired area at 33-1/3 years' purchase or in any event, at 20 years' purchase. The learned Subordinate Judge considered that the accounts produced by the claimant were not dependable for two reasons: (1) that they were not produced before the Land Acquisition Officer and (2) the accounts did not include the cost of manuring and expenses of seed sugarcane.

The learned Judge, therefore, proceeded to consider the sale deeds relied on by both the Government and the claimant, of lands in the vicinity. In his opinion two sale deeds were useful in arriving at a proper estimate of the value of the acquired land, namely, Exhibits A-11 and B-6. Having regard to the situation of the acquired land compared with the lands covered by Exhibits A-11 and B-6, the learned Judge came to the conclusion that an award of Rs. 2,000 per acre would meet the ends of justice. As regards the costs of putting up a fence, the learned Judge thought that the apprehension of the claimant that the Harijans may allow the cattle to stray on the rest of his land was not imaginary or unreal and awarded Rs. 500 as the probable cost of the fence.

The learned Government Pleader objected both to the increase in the rate of compensation for the land and also to the award of any amount for putting up a fence. As regards the value of the land he relied on Exhibit B-1 which was the basis of the Land Acquisition Officer's award. We do not think that Exhibit B-1 furnishes a proper criterion. It was uncultivated waste on a slope and stood on a mound 15 to 20 feet high and was apparently distinctly inferior to the acquired land. The Special Tahsildar who was the Land Acquisition Collector admitted in evidence that there was no crop on the property covered by Exhibit B-1 and it was lying fallow. On the other hand we have indubitable evidence that the acquired land had been cultivated partly with sugarcane and partly with punja crops. We therefore reject Exhibit B-1 from consideration. Mr. Rajah Ayyar on the other hand relied upon several sale deeds which undoubtedly give a very high rate going up to about Rs. 15,000 per acre. Many of these sale deeds related to pucca house-sites near the main road to Madras and in an inhabited locality. Exhibits A-6 to A-8 must be left out of account on this ground. Likewise Exhibits A-9 and A-5 (*vide* also the evidence of P.W. 2, 3 and 5). Exhibits A-10 relates to a sale of four

cents which appears to have been purchased for a special purpose, namely, to put up business premises to enable the owner to carry on the business of sale of pots and other mud articles. P.W. 6 who is the purchaser admits that there are houses in the neighbourhood and that the property is near the main road and that she has put up a tiled house after her purchase to carry on her business. So Exhibit A-10 is also not of much use. That leaves us with Exhibit A-11 one of the sale-deeds relied on by the learned Judge. We may mention that he also relied on Exhibit B-6; but that was an exchange and we do not think it safe to take that deed as a proper guide to the value of the lands acquired.

The land under Exhibit A-11 was purchased by P.W. 4 for Rs. 900. The extent is 36 cents. But from the evidence of P.W. 4 it appears that there were 400 plantain trees and a thatched shed on the property. According to the witness, each plantain tree would be worth one rupee and the thatched shed may be worth Rs. 150. So deducting Rs. 500, we get Rs. 350 as representing the value of the land. That works out at Rs. 1,000 per acre. The learned Government Pleader contended that this land was a residential house site and was in the middle of a built-up locality and so it should not be the basis of award of compensation in respect of the acquired area. There is no evidence that the land sold under Exhibit A-11 was pucca house site. The fact that it contained 400 plantain trees shows that it was not treated as a house site. The Tahsildar who gave evidence as R.W. 1 did not have anything to say about this sale. We think that the learned Judge was right in relying upon this sale-deed. But we think that his estimate of Rs. 2,000 per acre is not justified. Allowing for the admitted increase in the price of land since 1948, we think that a rate of Rs. 1,500 per acre would be a fair and reasonable rate.

There is, however, evidence that fifty cents of the acquired land were being cultivated with sugarcane. Mr. Rajah Ayyar has given us information that an area of about 1 acre 14 cents altogether was being cultivated with sugarcane in the block of 7 acres odd. From the accounts it is not impossible to arrive at a rough estimate of the net profits which could be made by the claimant from a cultivation of fifty cents with sugarcane. We see no reason to entirely reject the accounts filed by the claimant. He is a respectable person, a retired District Board Engineer, and he has got a *Kariasthan* manager, P.W. 7. The reasons given by the learned Subordinate Judge for rejecting the accounts do not appeal to us. The fact that the accounts were not produced before the Land Acquisition Officer does not mean that they are not reliable. It is not always that the entire evidence is adduced before the Land Acquisition Officer by the claimants. The other reason that the cost of manuring and the expenses of seed sugarcane were not entered is not correct so far as fasli 1360 is concerned. The expenses are shown in the accounts. No doubt in a subsequent fasli 1361 there is no entry for expenses of seed sugarcane; but that is explained as due to the fact that the seed sugarcane came from the claimant's land, and there was no purchase from outside. Hence no entry is to be found in the accounts. We accept the accounts as reliable. No doubt the accounts did not show the net profits from the particular area of fifty cents out of the land acquired. But we think that roughly a sum of Rs. 250 at least would be the profit per acre. Capitalising at twenty years purchase we arrive at a figure of Rs. 5,000 per acre. The claimant is entitled to compensation at this rate for the fifty cents and at the rate of Rs. 1,500 for the remaining extent. Of course the claimant will be entitled to the statutory allowance of 15 per cent. and interest on the excess amount from the date of possession.

So far as the amounts awarded for cost of fence is concerned the learned Government Pleader does not object to the quantum but objects to the principle. He contended that there is no provision of law under which the claimant could be awarded this sum. In our opinion the sum could be properly awarded under the fourth clause of section 23(1) of the Land Acquisition Act, namely, the damage if any, sustained by the person interested, at the time of the Collector's taking possession of the land, by reason of the acquisition injuriously affecting his other property,

moveable, or immoveable, in any other manner, or his earning. In this case there is the evidence that by reason of the acquisition of a part of the claimant's property for the building of houses for the Harijans, nearly thirty in number, there is every likelihood of cattle and other animals kept by the Harijans straying on to the adjacent land of the claimant covered with crops and causing damage to them. The claimant himself has given evidence of this and the necessity for a fence. The Land Acquisition Officer admitted that each Harijan may have a bull, a buffalo, a cow and a calf and 7 or 8 sheep, though some have may none, and it was proposed to accommodate thirty Harijan families in the acquired land. So over two hundred animals, to say the least, would be capable of causing damage to the crops on the adjacent lands belonging to the claimant which have not been acquired. The Tahsildar expected the Harijans to take care of the cattle and prevent them from grazing on the land. We do not share with the Tahsildar his optimism. It is more likely that the Harijans will not be able to keep the cattle to their own land. We therefore hold that the award of Rs. 500 for the cost of the fence was proper and justified.

In the result the appeal by the Government is dismissed and the memorandum of cross-objection allowed to the extent indicated; but having regard to our above findings there will be no order as to costs either in the appeal or in the memorandum of cross-objections.

V.S. ——— *Appeal dismissed and cross-objections allowed in part.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE GANAPATIA PILLAI.

P. Murugayya Pillai .. *Petitioner**

v.

Seethalakshmi Ammal .. *Respondent.*

Practice—Order for furnishing security as condition of granting stay—Object of—Security of immoveable property directed to be furnished before a specified date—Compliance with—What amounts to.

The object of a Court in directing a party to furnish security in immovable property as a condition of its order is to assure the other party to the dispute or the decree-holder that the benefit of the order in his favour of the decree amount would be eventually paid or would be more easily recoverable. This object could be achieved only if a properly enforceable security bond duly engrossed on stamp paper and registered according to law is put into Court within the time specified. It may be that mere non-registration of the bond within the time fixed by Court may not be a fatal objection if the bond otherwise duly engrossed on stamp paper is filed in time as in such cases the Court can have the document compulsorily registered. But merely putting into Court a draft security bond on unstamped paper on the last day fixed for furnishing security cannot tantamount to compliance with the order of the Court as the obligor could not be deemed to have done what was required of him as the Court would have still to look to him for the furnishing of a valid security. The requirement of engrossing the security bond on a stamp paper is not a mere technicality. The principles governing the giving of security under section 17 of the Provincial Small Cause Courts Act will equally apply to cases of giving security in pursuance of orders of Court under the Code of Civil Procedure.

Case-law discussed.

Petition under section 115 of Act V of 1908 praying the High Court to revise the Order of the Court of the District Munsif, Nagapattinam, dated 1st October, 1956 and made in I.A. No. 154 of 1956 in O.S. No. 91 of 1953.

K. Raman, for Petitioner.

G. R. Jagadisa Ayyar and *T. S. Srinivasan*, for Respondent.

The Court delivered the following

JUDGMENT.—This Revision Petition is directed against the order of the learned District Munsif, Nagapattinam, whereby he held that the petitioner had not sufficiently complied with the order of the District Court of East Tanjore at Nagapattinam in C.M.P. No. 10 of 1955. That order of the District Judge was passed in an appeal

* C.R.P. No. 298 of 1957. 7th February, 1958.

preferred against the decree of the District Munsif, Nagapattinam, in O.S. No. 91 of 1953. The purport of the order was that the appellant was to deposit costs of suit into the lower Court and furnish security in the shape of immoveable properties for the amount of the decree as a condition of stay of further proceedings. The time given by the appellate Court for furnishing security and depositing costs ended with 20th March, 1956. Admittedly, costs of suit were deposited within the time allowed and a draft bond containing the description of the property proposed to be given as security was put into Court by the petitioner on 20th March, 1956, the last date of the period of thirty days granted by the appellate Court for this purpose. Objection was taken to the acceptance of this draft bond, and this, objection was upheld by the learned District Munsif relying upon the decision in *Marimuthu Gounder* v. *Ponnammal*[1] This decision followed a prior decision in *Kali Setti Penchalu Setti* v. *Potireddi Subba Reddi*[2]. In both these cases, it was held that a mere draft written on unstamped paper was not sufficient compliance with the order of a Court directing security of immovable property to be furnished by a particular date.

Mr. Jagadisa Ayyar, the learned counsel for the respondent contends that giving security or furnishing security of immoveable property usually ordered by appellate Courts as a condition of granting stay of further proceedings before the trial Court or other relief permissible under the Civil Procedure Code stands on a par with giving security mentioned in section 17 of the Provincial Small Cause Courts Act as a condition precedent to making an application for setting aside an *ex parte* decree passed in a small cause suit. In the case of security mentioned in section 17 of the Provincial Small Cause Courts Act, there has been a uniform course of decisions in this Court, starting from the decision of Ramesam, J., in *Balakrishna Ayyar* v. *Pichamuthu Pillai*[3], followed by the decision of King, J., in *Chathiyelan Kanna Kurup* v. *Raman Nayar*[4], and culminating in the decision of the Bench of this Court consisting of Govinda Menon and Ramaswami, JJ., in *Marimuthu Gounder* v. *Ponnammal*[1]. These decisions have all held that furnishing security within the meaning of section 17 of the Small Cause Courts Act should be construed as putting into Court a properly drafted security bond engrossed on stamp paper, which, if approved by the Court, could be converted into an enforceable security in law. Mr. Jagadisa Ayyar argues with some force that there should be no distinction in principle between furnishing security as required under section 17 of the Small Cause Courts Act and giving security in other cases governed by the Civil Procedure Code, where the purpose is the same.

A number of decisions of single Judges of this Court have been cited to me by Mr. K. Raman, the learned counsel for the petitioner, to show that, in the case of security to be furnished under the various Rules of the Civil Procedure Code, it has been held that the filing of a draft bond not engrossed on stamp paper is a sufficient compliance with the order of the Court directing security to be furnished. The earliest of these decisions is that of Jackson, J., reported in the Short Notes of 52 M.L.J. 53. This was followed by Happel, J., in C.R.P. No. 1511 of 1938 and by Mack, J., in *Swarna Rajamma* v. *Thota Venkiah*[5], and Yahya Ali, J., in *Ganapathi Naicker* v. *Govindarajulu*[6]. On an examination of these decisions, I find that the question as now presented before me did not arise for decision. The argument in all those cases was that, if the draft bond put into Court was eventually found to be sufficient but this was done after the expiry of the time fixed by the appellate Court for furnishing security there was no proper compliance with the order directing security of immoveable property to be given. The question whether the filing of a draft bond on plain paper was itself sufficient compliance with the order must however be deemed to have been only impliedly decided. In fact, Yahya Ali, J., expressly leaves this question open. I, therefore, feel that, in the absence of a Bench decision on this point. I am free to examine the question in its fundamentals. The object of an appellate Court directing security of immoveable property to be fur-

1. (1956) 2 M.L.J. 25.
2. (1943) 2 M.L.J. 671.
3. (1921) 15 L.W. 186.
4. (1942) 2 M.L.J. 425.
5. (1949) 2 M.L.J. 13.
6. (1946) 2 M.L.J. 217 : A.I.R. 1947 Mad. 70.

nished as a condition of its order is to assure the decree-holder that the decree amount would be eventually paid, or, would be more easily recoverable. This object could be achieved by a properly enforceable security bond engrossed on stamp paper and registered, being put into Court within the time fixed by the Court. Mr. Jagadisa Ayyar's argument was that if time is allowed for the performance of this act and if on the last date of this period a draft bond written on plain paper is put into Court, it would not amount to compliance with the order of Court to give security, because the party bound to give security has not done anything which could be construed as putting himself in peril of the security being enforced against him. The word "security" has not been defined either in the Civil Procedure Code or in the Provincial Small Cause Courts Act or in the General Clauses Act. But it will be readily accepted that it means and includes the filing into Court of an enforceable document for the purpose of giving assurance to the decree-holder about payment of the money due to him under the decree. Such a purpose can be achieved only if the bond put into Court by the obligor could be converted into a legally enforceable security without any further act to be performed by him. It is true that, even if a security bond charging immoveable property and engrossed on stamp paper is put into Court, it would have to be registered before it could be enforced in law. But, for this purpose, the Court is not helpless ; nor need it depend on any further act of the obligor, because, compulsory registration of the bond could be had at the instance of the Court. On the other hand, if on the last day of the period fixed or within the period fixed a draft security bond written on plain paper is put into Court, the obligor could not be deemed to have done what was necessary for furnishing security, because, the Court would still have to look to him for the furnishing of a security bond engrossed on stamp paper. The requirement as to the bond being engrossed on stamp paper is not therefore a mere technicality as it might seem at first sight. It is really an indication that the obligor is in earnest in complying with the order of the Court and has done all that could be done by him to carry out that order. In this view, I see no difficulty in accepting the principle, which has been applied by the rulings of this Court to giving security under section 17 of the Small Cause Courts Act, as applicable to giving security in the case of orders passed under the Civil Procedure Code also. In this view, I am of opinion that the order of the lower Court is correct and this Civil Revision Petition should be dismissed.

There will be no order as to costs.

R.M. —————— *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—*MR. JUSTICE RAJAGOPALAN.

Sundaralingam Chettiar and others .. *Petitioners**

v.

S. Nagalingam Chettiar and others .. *Respondents.*

Civil Procedure Code (V of 1908), Order 6, rule 17 and section 92—Suit under section 92—Relief of removal of trustees—Amendment pleading invalidity of the appointment of trustees—Whether can be allowed.

Whether it is the personal right of the plaintiff to be a trustee that is asserted or whether it is the personal right of the defendants to be trustees that is denied, the principle is the same and when such right to hold an office of trustee is asserted or denied that would fall outside the scope of section 92.

The cause of action for the removal of the trustees arose only subsequent to their assumption of office as trustees and that was what was pleaded in the plaint. The cause of action for a declaration that the assumption of office itself was invalid was antecedent to such assumption. The removal for which section 92 provides cannot be construed to include within its scope cases where the right to hold the office itself is challenged. Apart from the fact that the proposed amendment can only lead to a relief not specifically asked for and cannot lead to the grant of the relief of removal which was specifically asked for, it is a new cause of action that has to be pleaded. The case based on the proposed amendment is also inconsistent with that already pleaded ; further the delay in making the application, even if otherwise allowable has not been explained. The refusal to amend the plaint was therefore proper.

* C.R.P. No. 902 of 1957. 8th July, 1957.

Petition under section 115 of Act V of 1908 praying the High Court to revise the Order of the Court of the Subordinate Judge of Madurai, dated 17th January, 1957 and made in I.A. No. 484 of 1956 in O.S. No. 135 of 1955.

R. Gopalaswami Ayyangar, for Petitioners.

K. S. Ramamurthi and *K. Vaitheeswaran*, for Respondents.

The Court delivered the following

JUDGMENT.—The petitioners, who were the plaintiffs in O.S. No. 135 of 1955 on the file of the Subordinate Judge's Court, Madurai, applied under section 115, Civil Procedure Code, to revise the order of the learned Subordinate Judge, who rejected their application to amend the plaint in that suit.

The suit was filed under section 92, Civil Procedure Code, and the main reliefs asked for in the plaint were: (1) to modify the scheme and to provide for expenses for educational purposes out of the trust funds, and (2) the removal of defendants 1 to 5 from the trusteeship and the appointment of fresh trustees in their place. I am not concerned in these proceedings with the first of these two reliefs. In paragraph 14 of the plaint the plaintiffs set out the grounds on which they sought the removal of the trustees, defendants 1 to 5, which in substance were mismanagement of the trust funds, to which it was alleged internecine quarrels between the trustees also contributed. The amendment sought was the addition of a further plea which ran :

"The plaintiffs submit that the election of defendants 2 and 3 is invalid for the reasons that at the meeting which is said to have elected them. they brought outsiders as stated above and made them vote in their favour. The plaintiffs further submit that under the custom and usage governing the institution and the letter and spirit of the scheme it is only the managing trustee who is entitled to call a meeting of trustees to elect the managing trustee. In this case it appears that though the 7th defendant who was the then managing trustee had applied for directions in E.A. No. 778 of 1955 as early as 1st November, 1955. from this Honourable Court, defendants 1 to 5 claimed to have called a meeting and selected the first defendant as the managing member. The plaintiffs therefore submit that the so called selection of the first defendant as managing trustee even if true is invalid and illegal".

The learned Subordinate Judge held that it was a new case that the plaintiffs attempted to set up, which was not permissible by way of amendment. He held further that the scope of the suit filed under section 92, Civil Procedure Code should not be permitted to be enlarged beyond that of the sanction accorded by the Advocate-General.

The main contention of the learned counsel for the petitioners was that the amendment was sought only to set out additional grounds for the relief already asked for in the plaint, the removal of defendants 1 to 5 from their office of trustees. In my opinion, the learned counsel for the respondents was well-founded in his contention, that the proposed amendment could only furnish material for a different relief based on a cause of action different from that pleaded in the plaint.

To consider the scope of a suit unit under section 92, Civil Procedure Code, the following observations of Woodroffe, J., in *Budree DasMukim* v. *Chooni Lal Johurry*[1], are apposite :

" It is of course admitted that the trust is a public one. But the section further assumes that the suit is a representative one brought for the benefit of the public and to enforce its rights upon a cause of action alleging a breach of trust or necessity for directions for administration against a trustee and for the particular relief mentioned."

A suit for a declaration, that the person in office was not entitled to be a trustee and that the assumption of office itself was invalid, does not in my opinion, fall within the scope of section 92, Civil Procedure Code.

In *Vythilinga Pandara Sannadhi* v. *Temple Committee, Tinnevelly Circle*[2], a Division Bench of this Court considered the scope of the analogous provision, section 73 of Madras Act II of 1927. At page 1014, Curgenven, J., observed :—

1. (1906) I.L.R. 33 Cal. 789, 804.
2. (1931) 61 M.L.J. 815 : I.L.R. 54 Mad. 1011.

" . . . . . it appears to me very doubtful whether a suit by a trustee to establish his hereditary right to his office is a suit in respect of the administration or management of the religious endowment to which the trusteeship appertains. It is a suit relating to a personal right, and though upon its decision may depend the question whether or not the plaintiff continues in office as trustee, that question is not one arising out of the administration of the trust, as for instance where a trustee is removed for breach of trust or mismanagement. The suit raises no issue as to the manner in which the trust property has been administered or should in future be administered. From that point of view, too, it will not fall within the terms of section 92 of the Code of Civil Procedure, a provision which was designed to deal with every aspect of the management of endowments.

As in *Budree Das Mukim* v. *Chooni Lal Johurry*[1] so here, no directions are necessary for the administration of the trust. In dealing with the question whether a suit by hereditary muktears for a declaration that certain persons were not properly appointed trustees fell within provisions of section 92, it was held by the Bombay High Court in *Nilkanth Devarao* v. *Ramakrishna Vithal*[2] that the section did not apply because it provided only for two cases, (i) either there must be an alleged breach of any express or constructive trust or (ii) the direction of the Court must be deemed necessary for the administration, of any such trust. This I think, affords some authority for the view that a suit of this character is not one in respect of the administration, or management of the endowment.".

The principle, in my opinion, should be the same, whether it is a personal right of the plaintiff to be a trustee that is asserted, or whether it is the personal right of one or more of the defendants to be trustees that is denied. When the right to hold an office of trustee is asserted or denied and relief is asked for on that basis, that would appear to fall outside the scope of section 92, Civil Procedure Code.

If I understood the learned counsel aright, he did not challenge the position, that a suit for a declaration that a given person is not entitled to be a trustee fell outside the scope of section 92, Civil Procedure Code. Yet, in substance that was what the plaintiffs wanted, without seeking in express terms such a relief.

The cause of action for the removal of the trustees arose only subsequent to their assumption of office as trustees, and that was what was pleaded in the plaint. The cause of action for a declaration that the assumption of office itself was invalid was antecedent to such assumption, in this case the election of defendants 2 and 3 as trustees and the subsequent election of defendant 1 as managing trustee. The "removal" for which section 92, Civil Procedure Code, provides cannot be construed to include within its scope cases where the right to hold the office itself is challenged. To put it in other words, a trustee *de jure* can be removed. A trustee *de son tort* is without any legal right to hold the office. In such a case there can be no need to ask for his removal from office. Apart from the fact, that the proposed amendment can only lead to a relief not specifically asked for and cannot lead to the grant of the relief of removal which was specifically asked for, it is a new cause of action that has to be pleaded. The case based on the proposed amendment is also inconsistent with that already pleaded. The plaint proceeded on the basis, that defendants 1 to 5 were entitled to hold their offices but that by their conduct they made themselves liable to be removed from those offices. The amendment sought was that three of the defendants were never entitled at all to hold their offices. The question, whether both the reliefs, that for a declaration that a defendant is not entitled to be a trustee, and in the alternative, the relief that if the defendant was lawfully entitled to be a trustee, by his subsequent conduct he had rendered himself liable to be removed from the office, could be asked for in the same plaint does not arise for consideration in this case. Where there is a multiplicity of defendants in such a suit and the right of only some of the defendants to be trustees is challenged, to what extent such a suit would come within the scope of Order 2, rule 3, Civil Procedure Code, does not arise for consideration either. The case I have now to deal with is that of an amendment of a plaint. I have pointed out that the proposed amendment would introduce a new cause of action and also set up a case inconsistent with that already pleaded. Such an amendment is not permissible.

It may not be necessary to refer to all the cases cited during the arguments before me, in which the rights and liabilities of trustees *de son tort*, and in particular their liability to be sued under section 92, Civil Procedure Code, where the relief

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1. (1906) I.L.R. 33 Cal. 789.
2. (1921) I.L.R. 46 Bom. 101.

sought did fall within the scope of that section, were discussed. None of them dealt with the problem, whether invalidity of assumption of office could be one of the grounds on which "removal" from office could be asked for within the meaning of section 92, Civil Procedure Code.

Even had the amendment been permissible and the learned Subordinate Judge was wrong in refusing it, the question of delay, which he had no occasion to discuss, would have arisen for consideration in deciding whether I should interfere in revision. The validity of the election of defendants 1, 2 and 3 was the subject-matter of other proceedings. The plaintiffs were obviously aware of the facts, on the basis of which they challenged the validity of the election, even before they presented the plaint. The delay in seeking the amendment was never really explained.

I see no justification to interfere in revision. The Revision Petition is dismissed with costs.

V.S. ——— *Revision dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE GANAPATIA PILLAI.

P. V. Subbayyan Chettiar .. *Appellant**

v.

Rajaram (Minor by his grandmother and guardian, Kamakkal) and another .. *Respondents.*

Deed—Construction—Husband settling property on his wife—Subsequent clause property should be enjoyed by the settlee and by the male heirs from generation to generation—Effect of.

The recital in the settlement deed in Tamil was to the effect: "At the request of the settlor: the mother and brother of the bride-to-be had agreed to give the bride in second marriage to the settlor on condition that the settlor made a gift of the property to her; and the settlor having agreed to this request was making a settlement deed to effectuate the gift which he intended to make." After this follows another sentence which reads that 'the property should be enjoyed by the settlee and by the male heirs born to her by the settlor from generation to generation'. On the construction of the deed,

Held. Where in the operative clause there is no mention of any gift or devise in favour of any heirs of the settlor and where it cannot be inferred from the recitals that the dominant or the sole intention of the settlor was to make a gift only to the male heirs to be born through the second wife without giving any independent estate of gift in favour of the second wife, the settlee gets an absolute interest in the property.

The subsequent clause cannot control the full import or effect of the operative sentence which precedes it and by which the settlor had conferred an absolute estate to the wife. It is settled law that such subsequent clauses detailing the mode of enjoyment or the devolution of the properties from generation to generation do not curtail the full effect of the operative clause, by which the settlor had already expressed his intention to confer an absolute estate on the settlee. It is well established that such a clause as 'to be enjoyed from generation to generation' indicates only a heritable estate. It is also well settled that the word 'sarvaswathanthiramai' occurring in a settlement or gift deed indicates an absolute estate.

Appeal against the Decree of the Court of the Subordinate Judge, Dindigul in Appeal Suit No. 19 of 1954 preferred against the Decree of the Court of the District Munsif of Periyakulam in Original Suit No. 56 of 1953.

T. M. Krishnaswami Ayyar and *A. Balasubramaniam*, for Appellant.

V. Seshadri and *K. S. Ramamurthi*, for Respondents.

The Court delivered the following

JUDGMENT.—The plaintiff is the appellant in this second appeal which arises out of a suit instituted by him for setting aside the order in E.A. No. 680 of 1952 on the file of the Court of the District Munsif, Periakulam. The admitted facts are shortly these. The appellant obtained a money decree against defendant 2 and her husband on a promissory note in O.S. No. 101 of 1948. In execution

* Second Appeal No. 320 of 1955. 31st October, 1957.

of that decree, he brought to sale two items of properties and purchased them himself. The property now in dispute in this litigation is the first item out of the two purchased items. After the appellant had taken delivery of possession of this item through Court, the first defendant the son of the 2nd defendant applied under rule 100 of Order 21 for an order of re-delivery and this application was allowed. To set aside this order, the suit was brought by the present appellant. The title of the judgment-debtor is based upon Exhibit B-1, a settlement deed, dated 2nd July, 1937, executed by her husband, Ramaswami Chettiar, in her favour. The trial Court, on a construction of this deed held that the judgment-debtor was conferred an absolute estate in the properties which were sold in execution and that her son, the first defendant, had no manner of right or title to this property. Against that decision, an appeal was taken to the Subordinate Judge, Dindigul, who, differing from the trial Judge, construed the estate conferred upon the judgment-debtor, Balamani Ammal, as a life estate, and, allowing the appeal, modified the decree of the lower Court to the extent of declaring that the appellant would get only a life estate in item 1 of the plaint A Schedule for the life of the judgment-debtor. The question for consideration in the second appeal is, which is the correct interpretation of Exhibit B-1. Three decisions are referred to in the judgment of the trial Court in support of his conclusion that the terms of Exhibit B-1, correctly read, conferred an absolute estate upon Balamani Ammal in respect of the property now in dispute. They are *Pugalum Perumal* v. *Thangathammal*[1]; *Lakshmana Reddi* v. *Nallappa Reddi*[2] and *Nagaraja* v. *Natesa*[3]. The lower appellate Court, without considering the effect of these decisions relied on by the trial Court, referred to the decision of the Supreme Court in *Bajrang Bahadur Singh* v. *Bakhtrai Kuer*[4], as having a direct bearing on the interpretation of Exhibit B-1. That case related to the construction of a will. The following observation of the Supreme Court is relied on by the lower appellate Court :—

"Where the dominant intention of the testator was to make provision not for the donee alone but for the benefit of his heirs and successors, generation after generation, the expression heirs' in the context will mean the donee's heirs determined according to the general law of inheritance."

I am afraid this principle can have no application to the interpretation of a settlement deed like Exhibit-B-1, where, in the operative clause, there is no mention of any gift or devise in favour of any heirs of the settlor. Mr. K. S. Ramamurthi the learned counsel for the respondent, brought to my notice the Bench decision in *Madura H. P. Fund* v. *Kamakshi Ammal*[5]. There also, a devise in a will came up for construction and the words contained in the will and which indicated the donees were these : " My natural father, Pichu Ayyar, and male heirs ". In construing this description of the donee, the Bench held that the bequest could not be considered as one in favour of the father alone. An examination of the terms of Exhibit B-1 clearly shows that Ramaswami Chettiar was making a gift in favour of Balamani Ammal alone. No doubt, the learned counsel for the respondent pointed to the fact that one of the reason given in Exhibit B-1 for the contemplated second marriage was that Ramaswami Chettiar had no male issue by his first wife. Equally, another reason also is given for making the gift, that is, that he Ramaswami Chettiar wanted to marry a second wife, because his first wife had deserted him. It cannot therefore be inferred from the recitals in Exhibit B-1 that the dominant or the sole intention of Ramaswami Chettiar was to make a gift only to the male issue to be born through Balamani Ammal without giving any independent estate of gift in favour of Balamani Ammal. If the language of Exhibit B-1 is carefully scrutinised, there is no real difficulty at all in finding out what the settlor meant. The operative clause is contained in a sentence which is complete by itself both grammatically and in its sense. That sentence imports the following idea :

" At the request of the settlor, the mother and brother of the bride-to-be had agreed to give the bride, Balamani, in marriage to the settlor on condition that the settlor made a gift of the property

1. (1949) 1 M L J. 389.
2. (1953) 2 M.L.J. 14 (Short Notes).
3. A.I.R. 1925 Mad. 1013.
4. (1952) S.C.J. 655: (1953) 1 M.L.J. 108 (S.C.).
5. (1925) 50 M.L.J. 355 : A.I.R. 1926 Mad. 492.

(now in question) to Balamani ; and the settlor, having agreed to this request, was making a settlement deed to effectuate the gift which he intended to make."

After this sentence in Tamil is completed, follows another sentence which reads that the property should be enjoyed by the settlee and by the male heirs born to her by the settlor from generation to generation. This subsequent sentence cannot in any sense control the full import or effect of the operative sentence which precedes it and by which the settlor had conferred an absolute estate in the property on his bride-to-be. It is settled law that such subsequent clauses detailing the mode of enjoyment or the devolution of the properties from generation to generation do not curtail the full effect of the operative clause, by which the settlor had already expressed his intention to confer an absolute estate on the settlee. It is well established that such a clause as " to be enjoyed from generation to generation " indicates only a heritable estate. It is also well settled that the word "Sarvaswathanthiramai" occurring in a settlement or gift deed indicates an absolute estate. Having regard to these settled principles of law, it is very clear that the trial Court came to the correct conclusion as regards the import of Exhibit B-1 and held that Balamani Ammal, the judgment-debtor, obtained an absolute estate in the property. The contrary view taken by the lower appellate Court is incorrect.

In the result, the Second Appeal is allowed and the decree of the lower Appellate Court is set aside and that of the trial Court restored with costs both in this Court and in the lower Appellate Court.

No leave.

V.S. *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—P. RAJAGOPALAN, *Officiating Chief Justice* AND MR. JUSTICE RAMACHANDRA IYER.

Pinapala Venkateswarlu .. *Appellant**

Letters Patent (*Madras*), *clause* 15 *and Appellate Side Rules* (*Madras*), *rule* 95—*Applicability—Order refusing to amend the decree in second appeal—Appeal against—Leave of Judge whose order was appealed against—Necessity.*

An application to amend a decree in second appeal certainly invokes the civil appellate jurisdiction vested in the High Court. In the absence of leave of the Judge who dismissed the application to amend the decree, an appeal against such dismissal is incompetent. Clause 15 of the Letters Patent applies to the case.

Appeal under clause 15 of the Letters Patent against the order of Mr. Justice Ramaswami, dated 28th October, 1957 and made in S.R. No. 28720 of 1957 in S. A. No. 2727 of 1949 on the file of the High Court.

V. Devarajan, for Appellant.

The Order of the Court was pronounced by

Rajagopalan, O.C.J.—We agree with the office that clause 15 of the Letters Patent does apply. The application to amend the decree in the Second Appeal certainly invoked the civil appellate jurisdiction vested in this Court. If so leave of the learned Judge who dismissed the application to amend the decree was necessary under rule 95 of the Appellate Side Rules read with clause 15 of the Letters Patent. No such leave was asked for or obtained. The appeal is incompetent.

V.S. *Office note accepted.*

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*S.R. No. 33798 of 1957. 10th February, 1958.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. P. V. RAJAMANNAR, *Chief Justice* AND MR. JUSTICE PANCHAPAKESA AYYAR.

S. Venkatakrishnan .. *Appellant*.*

Imports and Exports (Control) Act (XVIII of 1947), section 3—Exports (Control) Order (1954), clause 7—Scope—Powers of Central Government—Decision to prohibit export of dry chillies—Subsequent grant of special permission to export to certain co-operative societies at the request of Government of foreign country—Legality—Articles 14 and 19 (1)(g), Constitution of India (1950)—If violated—Non-publication of permission in Gazette—Effect of.

Section 3 of the Imports and Exports (Control) Act, 1947, and clause (7) of the Exports (Control) Order, 1954, make it clear that except under and in accordance with a licence granted by the Government no person can export dry chillies, one of the commodities mentioned in Schedule I to that Order; and it is open to the Government to grant licences for the export of dry chillies.

If the Government, as a matter of policy, decide by an executive order that the export of chillies should be altogether stopped and that in the interests of the public, there should be no issue of licences for the export of chillies, and then make an exception and give special permission to the Government of another country to purchase and to take to that country a certain quantity of chillies through certain co-operative societies holding stocks, it cannot be said that the Government is violating Article 14 or Article 19 (1) (*g*) of the Constitution.

If the Government decide to make an exception to the general ban in favour of certain co-operative societies only to the exclusion of private persons, there may be a case for challenging the act as discriminatory ; when even the co-operative societies are not given general licences, and the Government choose the co-operative societies as the instruments to complete the transaction with the foreign Government, the co-operative societies not being mere profit making organisions like private bodies, the action of the Government cannot be said to be vitiated by arbitrariness or favouritism. The fundamental right guaranteed under Article 19 (1) (*g*) is not any way violated by such special permission granted to co-operative societies to export chillies to the foreign country.

The non-publication of the permission granted to co-operative societies in the Gazette does not detract from the validity of such permission. There is no statutory requirement that policy decisions of the Government in exceptional circumstances should be published in the Official Gazette.

Appeal under clause 15 of the Letters Patent against the order of Mr. Justice Rajagopala Ayyangar, dated 30th May, 1957 and made in the exercise of Special Original Jurisdiction of the High Court in Writ Petition No. 442 of 1957, a petition presented to the High Court under Article 226 of the Constitution of India to issue a writ directing the respondent therein to forbear from issuing any license or allotment memo. to any co-operative society in the Madras State for the export of dried chillies to destinations other than Pakistan and hard currency countries and give consequential directions to the respondent therein to consider the grant of license to the petitioner without any discrimination.

A. Ramachandran, for *Row* and *Reddy*, for Appellant.

The Judgment of the Court was delivered by

Rajamannar, C.J.—We agree with the conclusion of Rajagopala Ayyangar, J., against whose judgment this appeal has been filed, that the appellant is not entitled to either of the reliefs sought by him under Article 226 of the Constitution of India. The twofold prayer of the appellant was for the issue of a writ, order or direction directing the respondent, that is, the Joint Chief Controller of Imports and Exports, Madras, to forbear from issuing any license or allotment memo. to any co-operative society in the Madras State for the export of dried chillies to destinations other than Pakistan and hard currency countries and cancel such licences or allotment memos. already issued and give consequential directions to the respondent to consider the grant of licence to the petitioner without any discrimination.

Section 3 of the Imports and Exports (Control) Act, 1947, was enacted to continue, for a limited period, powers to prohibit or control imports or exports in public interests. Section 3 of this Act empowers the Central Government, by order published in the official Gazette, to provide for prohibiting, restricting or otherwise controlling, in all cases or in specified classes of cases, and subject to such exceptions as may be made by or under the order, the import, export, carriage

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*W.A. No. 92 of 1957. 12th August, 1957.

coastwise or shipment as ships' stores, of goods of any specified description. The Exports (Control) Order, 1954, which was made in exercise of the powers conferred by the Imports and Exports (Control) Act, 1947, provided for the issue of licences for import and export of goods specified therein. Clause 7 of this Order, *inter alia*, declared that nothing in the Order shall apply to any goods exported by or under the authority of the Central Government. Schedule I to the Exports (Control) Order specified the goods in respect of which an absolute restriction was placed on exports except under and in accordance with the licence granted by the Central Government or by any officer specified in Schedule II to the Order. Dry chillies is one of the commodities mentioned in Schedule I. In view of the above provisions it is clear that except under and in accordance with the licence granted by Government, no person can export dry chillies. It was not contended before us that the provisions of the Imports and Exports (Control) Act, 1947, or the Exports (Control) Order, 1954, was *ultra vires* and unconstitutional. It is common ground that though it was open to the Government to issue licences for the export of chillies, as a matter of policy, the Government decided by an executive order in May, 1956, that the export of chillies should be altogether stopped. This total ban really amounted to the statement of policy and the Government did not alter any of the provisions of the Exports (Control) Order or the Imports and Exports (Control) Act. Under clause 3 of the Exports (Control) Order it was open to the Central Government to grant licences for the export of dry chillies. Only they decided in the interests of the public presumably that there should be no issue of such licences. While this policy was being followed, an exception appears to have been made in the following circumstances. The Food Commissioner of the Government of Ceylon wanted a supply of 2,500 tons of chillies and the Government of India decided as a special case to release 2,500 tons of chillies for export to the Ceylon Government. In effect the transaction was really permission granted to another Government, by its representative, to purchase and export to that country a specified quantity of dry chillies from this country.

The Government of Ceylon, that is, the Food Commissioner to that Government, was advised to make the purchase of chillies up to 2,500 tons from co-operative societies recommended by the State Government and such a list of societies was forwarded to him. It is only after evidence of purchase by the Food Commissioner of Ceylon was furnished by any particular co-operative society that a licence was directed to be issued to such society and only for quantities purchased from each of them. There was no general licence issued to any co-operative society to export any quantity of dried chillies which they may choose to. In effect, the transaction was nothing more than a special permission given to the Government of another country to purchase and take to their country a certain quantity of chillies and the co-operative societies were only indicated as the vendors of such chillies and to facilitate the export, the particular co-operative societies which sold the chillies were granted the licence to actually make the export of that quantity purchased from them. The Joint Chief Controller of Imports and Exports gave a list of approved co-operative societies and it was perfectly open to the Food Commissioner to purchase the chillies from any of these societies. It depended upon the stock with each of the societies and the convenience of the Food Commissioner or his representative. We see here no change of policy of the Government in favour of co-operative societies in general. It is not as if the Government intimated their decision to make an exception to the general ban in favour of co-operative societies only. On this view of the facts we fail to see how the appellant can sustain his contentions that Article 14 or Article 19 (1) (*g*) has been violated in any manner. The appellant might have an arguable case if the Government had published a notification or even issued a circular that only co-operative societies may be granted licenses for export of dry chillies under clause 3 of the Exports (Control) Order, but no private party should ever be given a licence. But this is not the case. Even the co-operative societies have not been given general licences to export chillies. Their right to export is confined to the quantity which the Food Commissioner might choose to purchase from any of them. If the Government choose the co-operative

societies as the instruments to complete the transaction with the Ceylon Government for the purchase and export of the chillies, we fail to see how it amounted to discrimination. The Government could not obviously choose anybody at random and if they choose societies which are not mere profit-making organisations like private bodies, we see no arbitrariness or favouritism.

We are unable to follow the appellant's contention that the fundamental right guranteed under Article 19 (1) (g) has been in any manner violated by the special permission granted, to certain co-operative societies to export quantities of dry chillies. As we mentioned at the outset, there is no statutory rule or order prohibiting the issue of licence under clause (3) of the Exports (Control) Order. It is true that that clause prevents the export by any person or body of persons without a licence. Such provisions have never been held to be in derogation of fundamental rights because such provisions have always been enacted in the interests of the public and for the regulation of trade and for the conservation of essential commodities. The clause is still there. It may be that the Government at one time decided not to grant any licence under clause 3 for the export of dry chillies. But when conditions altered, there is nothing to prevent the Government to change that policy. It is up to persons interested to make representations to Government and convince that an absolute ban is no longer necessary ; but it is not the province of this Court to indicate to the Government that their policy should change. All that we can say is that there has been no violation of any fundamental right or the principle underlying Article 14, so far as the appellant before us is concerned.

A subsidiary point was pressed before us, namely, that the permission granted to the co-operative societies to effect the exports was not published in the Gazette. With great respect to Rajagopala Ayyangar, J., we must confess we were not impressed by the argument even at first sight. Indeed we are unable even to follow the argument. The Chief Controller of Imports and Exports, New Delhi, informed the Joint Chief Controllers of Madras, Bombay and Calcutta that licences may be issued to certain co-operative societies to export quantities of dry chillies which may be sold to the Ceylon Government. We fail to see why this departmental instruction should be published in the Official Gazette. As Rajagopala Ayyangar, J., observed, there is no statutory requirement that policy decisions of the Government in exceptional circumstances should be published in the Official Gazette. We see nothing in this objection. The appeal is dismissed.

P.R.N. ——— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE PANCHAPAKESA AYYAR AND MR. JUSTICE BASHEER AHMED SAYEED.

Kaliammal *alias* Thayammal .. *Appellant**

v.

Pongiammal and others .. *Respondents.*

Civil Procedure Code (V of 1908), Order 18, rule 18—Local inspection by Court—Notes of local inspection—Duty to make and keep it as part of the record—Failure to do so—If vitiates the judgment—Desirability of amending the rule.

It is no doubt true that Order 18, rule 18 of the Code of Civil Procedure (unlike section 539-B (2)) of the Criminal Procedure Code does not in express terms require a Court to make notes of local inspection made by it under that rule and keep it as part of the record. The omission in Order 18, rule 18, Civil Procedure Code, to make a Court holding local inspection prepare notes of such inspection and keep them on record, is only by inadvertance and is not intended deliberately. But this omission does not mean that a Judge holding local inspection is not under a duty to make notes of such inspection and keep it as part of the record of the case.

Local inspection is done by the Court in its discretion and it could be done at any stage of the proceedings either *suo motu* or at the instance of the parties to the cause. Though a local inspection might influence the judgment of the Court in varying degrees in different cases and in certain cases may have no bearing at all on the judgment, still the facts discovered at a local inspection might consciously or unconsciously influence its conclusions in the judgment. Hence it is not only desirable

*Second Appeal No. 712 of 1954. 29th January, 1958.

but necessary, that a Court making a local inspection should make notes of such inspection and the facts observed by the Court and keep it as part of the record. The judgment of a Court which makes a local inspection but fails to prepare notes of that inspection and keep them on record will be vitiated.

Case-law discussed.

It is desirable for the Rules Committee to amend Order 18, rule 18, of the Civil Procedure Code. by adding a provision for the preparation of notes of inspection and keeping them on record.

Appeal against the Decree of the Court of the Subordinate Judge of Coimbatore (2nd additional) in Appeal Suit No. 3 of 1953, preferred against the Decree of the Court of the District Munsif of Gobichettipalayam in Original Suit No. 107 of 1950.

V. Tyagarajan, S. Thyagaraja Ayyar and *N. Vanchinathan*, for Appellant.

G. R. Jagadisan and *A. R. Ramanathan*, for Respondents.

The Judgment of the Court was delivered by

Panchapakesa Ayyar, J.—This appeal was posted before Govinda Menon, J., (as he then was). He has, because of divergence of views between Judges, regarding whether notes of a local inspection made by a Court should be prepared and kept on record or not and whether the failure to do so would vitiate the judgment or not, referred this Second Appeal to a Bench for being decided by it. That is how it has come before us.

The facts were briefly these: O.S. No. 107 of 1950 on the file of the District Munsif, Gobichettipalayam, was filed by one Kaliammal *alias* Thayammal, for a declaration of her easementary right to use the suit pathway A B C marked green in the suit plan, to go to her land S. No. 44-C and to take her men, cattle and carts along it, and for a permanent injunction restraining the defendants and their men from obstructing her and her men from walking along or taking men and cattle and carts along the said pathway, A B C and for costs. The suit was stoutly resisted by the defendants on the ground that the plaintiff had no easementary right of any kind, and that she had no right to take any carts or cattle or men along the pathway. The learned District Munsif, after discussing the evidence, held that the plaintiff was entitled to the right of way claimed and decreed the suit with costs. The defendants took the matter in appeal. The learned Second Additional Subordinate Judge, Coimbatore, heard the appeal, A.S. No. 3 of 1953 on his file. In the course of the pendency of the appeal he made a personal inspection of the suit locality, but did not prepare any notes of that inspection and leave it on record. He referred in para. 10 of his judgment to his local inspection and to some facts observed by him. He reversed the judgment of the learned District Munsif and dismissed the suit with costs throughout. The Second Appeal has been filed by the plaintiff against the judgment and decree in appeal.

One of the points urged in the Second Appeal was that the judgment of the lower Appellate Court was vitiated by the failure of the learned Subordinate Judge to prepare notes of his inspection and leave them on record. It was also contended that the lower Appellate Court had acted on facts found by it at the inspection without disclosing those facts by preparing notes of inspection and leaving them on record. Govinda Menon, J., thought that the first question, *viz*., whether the trial Court or the appellate Court making a local inspection was bound to prepare notes of such inspection and keep them on record, was an important one to be decided by a Bench.

We have perused the records and heard the learned counsel on both sides. We are now deciding only the question as to whether a Court, trial or appellate, making a local inspection is bound to prepare notes of inspection and keep them on record, whether or not the facts found by it at the local inspection had influenced it for arriving at its judgment and had been relied on by it as reason for its judgment. It was conceded by Mr. Jagadisa Ayyar and cannot be disputed on the rulings that if the facts found at the local inspection have been used, wherever it is permissible to do so, by the Court for arriving at its conclusions on the judgment, notes of such local inspection should be prepared and kept on record. But that will involve examining the judgment itself and finding how far the Court was influenced by the facts found at its local inspection in arriving at the judgment. The mere fundamental question is whether, even in the absence of proof that the facts found at the local inspection

had visibly influenced the Court in arriving at its judgment, the Court was still bound, once it made a local inspection, to prepare notes of such inspection and keep them on record, and whether the judgment would be vitiated by its failure to do so. Mr. Jagadisa Ayyar contended that, whatever might be the natural justice aspect of it, there is *nothing in law* to require a *Civil Court* making a local inspection, and not visibly relying on the facts found by it at the local inspection for arriving at its judgment to prepare notes of such local inspection and keep them on record. He pointed out that, under Order 18, rule 18, Civil Procedure Code, the Court may at any stage of a suit inspect any property or thing concerning which any question may arise and that the rule does not go on to state "and shall prepare notes of such local inspection and keep them on record," like section 539-B (2) of the Criminal Procedure Code, which specifically provides that a memorandum of any relevant facts observed at the local inspection shall be prepared and shall form part of the record of the case. From this omission he wanted to argue that it was not necessary for a Court, much less obligatory, to prepare notes of local inspection in a civil case under Order 18, rule 18, Civil Procedure Code. We are not convinced by this general argument based on the omission. It is obvious that a mere omission will not do in such cases. Under section 165 of the Evidence Act, a Judge may, in order to discover or obtain proper proof of relevant facts, ask any question he pleases, in any form, at any time, of any witness, or of the parties, about any fact relevant or irrelevant, and the section does not go on to state that he shall record the answers given in reply to such questions, obviously because that need not be said. The question, therefore, is whether the omission regarding the preparation of a memorandum or notes of inspection under Order 18, rule 18, Civil Procedure Code, would have the effect of not making it necessary for a Court to prepare such a memorandum even if it makes a local inspection. It must be remembered that it is making the local inspection *as a Court* and that such local inspection involves not only public time and energy but is also made after notice to all the parties. There must be some purpose in the Court's making such inspection. Of course, the Court is *not bound* under Order 18, rule 18, to make a local inspection, even if both the parties request it to do so, if it considers that it is not necessary. On the other hand, it can also make a local inspection even if neither party requests it to do so if it thinks it necessary in the interests of justice. Again, the local inspection may be made at any stage of a suit, namely before the evidence has begun to be recorded, or in the course of the recording of the evidence, or after the evidence is concluded and before the arguments are heard and judgment is delivered. It is also obvious that some local inspection may prove to be utterly useless for the purpose of the case, while others may be very useful, either for understanding the evidence, or for appreciating the evidence, or for believing some witnesses as against others, when the two sets speak to a state of facts in a contradictory fashion. Thus, if some witnesses say that a house is too small and incapable of being partitioned, and others say that it can conveniently be partitioned, and the Court makes an inspection, it is obvious that the facts discovered at the inspection will incline it towards the views expressed by one set of witnesses as against the other set of witnesses. So too, in a case about the age or value of a tree or building in dispute. While it is quite clear from the rulings that a Court cannot act on facts discovered by it at the local inspection against the evidence in the case, without any evidence in support of the facts discovered by it, and this is because the Judge is not put on oath or subjected to cross-examination and his notes are not even subjected to objections by either side, still it is obvious, as held in several cases, that his local inspection will, on the principle that "the eye is evidence", vitally influence him in cases where a view of the place is material to decide which version, out of two conflicting versions, is true. It has been held in *Buckingham* v. *Daily News, Ltd.*[1], that a view of the place by the Court is part of the evidence, just as much as an exhibit and that it is real *evidence*; and the weighty authority of Denning L.J., in *Goold* v. *Evans & Co.*[2], has been relied on for this observation. We are of opinion that, even if the judgment of the Judge making the local inspection is not visibly proved to have been influenced by the facts observed by him at the local

1. (1956) 2 All E.R. 904. 2. (1951) 2 T.L.R. 1189.

inspection, still the facts observed by him at the local inspection must have consciously or unconsciously contributed towards his conclusions in the Judgment. Otherwise there would have been no meaning in his making a local inspection. Of course, it is possible that in a few cases they contributed nothing at all in which case the notes of local inspection prepared by him would state so: any way, it is *desirable* and, in our opinion, *necessary*, that he should prepare notes of his local inspection and keep them on record, especially where there is a possibility that one of the parties might not have been present at the local inspection despite the notice having been given to him, and it is desirable that both sides should know all the facts the Judge observed at his local inspection and the result of such local inspection.

Mr. Jagadisa Ayyar relied on the ruling of a Bench of the Calcutta High Court in *Raj Chandra* v. *Iswar Chandra*[1]. There, it was observed that there was nothing in the Civil Procedure Code which obliged the Court holding the local inspection to leave notes regarding it. Indeed, it was added that, if the Judge left such notes on record the parties might object. This later observation was not relied on by Mr. Jagadisa Ayyar, whose only point was that, even though it may be *desirable* to prepare notes of inspection, it is not obligatory on the part of the Court to do so, and that if it fails to do so, the judgment would not be vitiated, unless the facts observed at the local inspection had visibly influenced the conclusions arrived it in the judgment or formed the basis of the judgment. He relied also on the observations of single Judges of the Calcutta High Court in *Bholanath* v. *Memuna Khatun*[2], and *Hari Charan* v. *Jitendra Nath*[3], much to the same effect. He also relied on the ruling of the Patna High Court in *Ram Chandra Rao* v. *Narayan Lal*[4]. There, the learned Judge, Jwala Prasad, J., held that, though it was *desirable* to prepare notes of local inspection and place them on record, the judgment would not be vitiated by a failure to do so, unless the facts found at the local inspection formed the basis of the judgment or helped the Judge in arriving at the conclusions therein. He also relied on the ruling of a Bench of the Bombay High Court in *Lakmidas Khushal* v. *Bhaiji Khushal*[5], to the effect that where a Subordinate Judge made a local inspection and decided the case by the light of his own view of the alleged passage, there was no error in the procedure adopted by the Subordinate Judge. But, there, of course, the parties knew what the facts were, which the learned Subordinate Judge had observed at his local inspection.

Mr. V. Thyagarajan, for the plaintiff-appellant, relied on the rulings of the Calcutta High Court in *Joy Coomar* v. *Bundhoo Lall*[6], holding that the result of the local inspection should be put on paper. He also relied on the ruling of a Bench of the Calcutta High Court in *Rai Kishore Ghose* v. *Kumudini Kanta Ghose*[7], and on the decisions of single Judges of this Court in *Municipal Council, Calicut* v. *Velayudha Menon*[8] and *Padmasani Bai* v. *Sabapathy Mudaliar*[9], where Ananthakrishna Aiyar, J., and Somayya, J., have held that notes should be prepared by the Court regarding the facts observed by it at the local inspection. He referred also to the ruling of a Bench of this Court in *Govindaswami Naidu* v. *Pushpalammal*[10], were Rajamannar, C.J., and Somasundaram, J., have held that even a Rent Controller making a local inspection, of the house in question, should prepare notes of his inspection and keep them on record, and argued therefrom that a Court should all the more do so. Mr. Jagadisa Ayyar too had referred to this ruling for showing that the principles of *natural justice* might require the preparation of such notes of local inspection. We agree with Mr. Thyagaraja Ayyar, and the rulings cited by him, and hold that the omission in Order 18, rule 18, Civil Procedure Code, to make a Court holding a local inspection prepare notes of such inspection and keep them on record, is only *by inadvertance* and is not intended deliberately, and that the judgment of a Court which makes a local inspection but fails to prepare notes of that inspection and keep them on record will be vitiated, as the facts discovered at the local inspection must have consciously

1. A.I.R. 1925 Cal. 170.
2. A.I.R. 1946 Cal. 444.
3. (1921) 65 I.C. 601.
4. (1920) 58 I.C. 909.
5. (1911) I.L.R. 35 Bom. 317.
6. (1882) I.L.R. 9 Cal. 363.
7. (1910) 14 I.C. 377.
8. A.I.R. 1931 Mad. 531.
9. (1932) 2 M.L.J. 284.
10. (1951) 2 M.L.J. 591.

or unconsciously been taken into consideration by it in arriving at its conclusion in the judgment.

In the end, therefore, we set aside the judgment and decree of the learned second Additional Subordinate Judge, Coimbatore, in A.S. No. 3 of 1953, and remand the appeal to the Subordinate Judge, Erode, (who has now territorial jurisdiction), for disposing of it afresh. The learned Subordinate Judge, who re-hears the appeal is free to make a local inspection if he wants; but if he makes a local inspection he should keep notes of such inspection on record. In the circumstances, we direct all the parties to bear their own costs in this Second Appeal. The Court-fee paid will be refunded. Leave refused.

We think it desirable for the Rules Committee to amend Order 18, rule 18, Civil Procedure Code by adding a provision for the preparation of notes of inspection and keeping them on record.

We leave all the other contentions of either side open, at the remanded hearing of the Appeal.

R.M. ——— *Appeal allowed and case remanded.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. P. RAJAGOPALAN, *Officiating Chief Justice* AND MR. JUSTICE RAJAGOPALA AYYANGAR.

M.CT.M. Corporation, Pudukottai by Director M. CT. Muthia Chettiar .. *Petitioner**

v.

Income-tax Officer, Pudukottai and another .. *Respondents.*

Income-tax Act (XI of 1922), section 18-A (3) and (8)—Scope of.

Sub-section (3) of section 18-A of the Income-tax Act does not cover every case where the Income-tax Officer is not enabled to make a demand under sub-section (1) of that section. A person who has been assessed to income-tax at some time or other in previous years cannot be brought within section 18-A (3) merely because he was not assessed to tax for some years later. Where a person is not bound to have voluntarily submitted an estimate under section 18-A (3) he cannot come within section 18-A (8).

Petition under Article 226 of the Constitution of India praying that in the circumstances stated in the affidavit filed therewith on the file of the High Court, the High Court will be pleased to issue a writ of *certiorari* calling for the records relating to the order of the 1st respondent, dated 29th March, 1956 and made in G.I. No. 39 M/51-52 levying penal interest of Rs. 10,591-3-0 as confirmed by the order of the second respondent, dated 2nd May, 1956, in G. No. 471 (144)/56 and quash the said order.

G. R. Jagadisan and *T. V. Balakrishnan*, for Petitioner.

C. S. Ramarao Sahib, Special Counsel for Income-tax on behalf of the Respondents.

The Judgment of the Court was delivered by

Rajagopala Ayyangar, J.—M.CT.M. Corporation, Private, Ltd., the petitioner before us, was incorporated as a private limited liability company in Pudukottai State. The Income-tax Officer of Pudukottai assessed the petitioner for the assessment year 1951-52 on the basis of a total income of Rs. 3,66,260 and issued a demand for the appropriate tax due. This order was passed on 31st March, 1954. The validity of this assessment or demand is not now in controversy. Subsequently by a communication dated 13th March, 1956, the Income-tax Officer issued notice to the petitioner under section 35 of the Act to show cause why his assessment should not be rectified by the addition of a further sum of Rs. 15,104-2-0 to the tax as ascertained by order dated 31st March, 1954, the addition being stated to be interest chargeable under section 18-A (8) of the Income-tax Act, which by mistake had been omitted to be included. The petitioner objected to the proposed rectification on several grounds to the details of which, we shall refer presently. But these objections were overruled

* Writ Petition No. 563 of 1956. 17th January, 1958.

and a sum of Rs. 10,591-3-0, this representing the correct figure for interest, was added to the tax demanded by an order, dated 29th March, 1956. Against this order the petitioner preferred a revision under section 33-A to the Commissioner of Income-tax but this having been rejected the present petition has been filed for the issue of a writ of *certiorari*, disputing the legality of the addition. The case of the petitioner before the departmental authorities and before us was twofold: (1) that the petitioner was not bound to have submitted a return of his estimated income under section 18 (3) of the Act and to have paid the appropriate tax due thereon, with the consequence that it was not chargeable with interest under section 18-A (8) of the Act. This was rested primarily on the ground that the petitioner had been assessed to tax under the provisions of the Indian Income-tax Act before the assessment year 1951-52, and that this took it out of the operation of section 18-A (3); (2) and that if the advance tax was payable by it, still the failure to include it in the final assessment order, dated 31st March, 1954, was not a mistake of the type which could be rectified under section 35 of the Act. In view of these arguments it is necessary to set out the material portions of section 18-A of the Act :

"18-A (1) (*a*).—In the case of income in respect of which provision is not made under section 18 for deduction of income-tax at the time of payment, the Income-tax Officer may, on or after the 1st day of April, in any financial, year, by order in writing, require an assessee to pay quarterly to the credit of the Central Government on the 15th day of June, 15th day of September, 15th day of December and 15th day of March in that year, respectively, an amount equal to one quarter of the income-tax and super-tax payable on so much of such income as is included in his total income of the latest previous year in respect of which he has been assessed if that total income exceeded the maximum amount not chargeable to tax in his case by two thousand five hundred rupees. Such income-tax and super-tax shall be calculated at the rates in force for the financial year in which he is required to pay the tax, and shall bear to the total amount of income-tax and super-tax so calculated on the said total income the same proportion as the amount of such inclusions bear to his total income, or, in cases where under the provisions of sub-section (1) of section 17 both income-tax and super-tax are chargeable with reference to the total world income shall bear to the total amount of income-tax and super-tax which would have been payable on his total world income of the said previous year had it been his total income the same proportion as the amount of such inclusions bears to his total world income :

. . . .

(2) If any assessee who is required to pay tax by an order under sub-section (1) estimates at any time before the last instalment is due that the part of his income to which that sub-section applies for the period which would be the previous year for an assessment for the year next following is less than the income on which he is required to pay tax and accordingly wishes to pay an amount less than the amount which he is so required to pay, he may send to the Income-tax Officer an estimate of the tax payable by him calculated in the manner laid down in sub-section (1) on that part of his income for such period, and shall on such of the dates specified in sub-section (1) (*a*) as have not expired or in one sum if only the last of such dates has not expired.

Provided that the assessee may send a revised estimate of the tax payable by him before any one of the dates specified in sub-section (1) (*a*) and adjust any excess or deficiency in respect of any instalment already paid in a subsequent instalment or in subsequent instalments.

(3) Any person who has not hitherto been assessed shall before the 15th day of March in each financial year, if his total income of the period which would be the previous year for an assessment for the financial year next following is likely to exceed the maximum amount not chargeable to tax in his case by two thousand five hundred rupees send to the Income-tax Officer an estimate of the tax payable by him on that part of his income to which the provisions of section 18 do not apply of the said previous year calculated in the manner laid down in sub-section (1), and shall pay the amount, on such of the dates specified in that sub-section as have not expired, by instalments which may be revised according to the proviso to sub-section (2).

. . . .

(8) Where on making the regular assessment, the Income-tax Officer finds that no payment of tax has been made in accordance with the foregoing provisions of this section, interest calculated in the manner laid down in sub-section (6) shall be added to the tax as determined on the basis of the regular assessment".

Before dealing with the construction of these provisions and the argument addressed to us on behalf of the petitioner, we might briefly summarise the reasoning contained in the orders of the Income-tax Officer and the Commissioner on the foot of which the petitioner's contentions were overruled. In its objections to the notice under section 35 issued by the Income-tax Officer, the petitioner raised the point that its case did not fall within sub-section (3) by reason of there having been previous assessment. The assessment relied on in this connection was for the year 1946-47. The Income-tax Officer rejected this plea recording :

"it is found that the assessment (for 1946-47) was made only indirectly on the agents Messrs. S.Rm. M. Ct.M. Firm, Madras. Further no computation of the total income or loss was made. but the assessee was declared as 'not liable'. I accordingly compute the interest payable under section 18-A (8) as under"

and proceeded to determine that a total interest of Rs. 10,591-3-0 was due from the petitioner. In the revision preferrd by the petitioner to the Commissioner of Income-tax besides the objection based on the scope of section 35 the plea, that the petitioner had already been assessed before the relevant year 1951-52 and hence was outside section 18-A (3) was raised. In regard to the latter point besides referring to the assessment for the year 1946-47 the petitioner also called in aid the assessments for the years 1939-40 to 1941-42. During these years the petitioner was not directly assessed but the shareholders of the petitioner-company were assessed on the basis of the profits of the petitioner-company under section 44-D of the Act. The argument urged on behalf of the petitioner was that, as the income of the petitioner was ascertained for the purpose of computing the tax liability of the shareholders, it amounted to an assessment of the petitioner-company itself during those years. The Commissioner rejected the revision, without however dealing in his order with the petitioner's case as regards its having been assessed during the period 1939-40 to 1941-42, but after discussing in detail the other matters set out in the revision petition.

In the present writ petition besides the points urged in the revision to the Commissioner, the petitioner also raised for our consideration the following further points. Even if the case of the petitioner fell under section 18-A (3), (1) the failure to submit an estimate and pay the tax payable threon was *bona fide* and due to justifiable cause and the Income-tax Officer ought to have waived the interest under the last proviso to section 18-A (6). (2) The primary default committed by the petitioner was the non-submission of the estimate and not the payment of the tax, which latter would come in only, if an estimate was submitted and to this situation only sub-section (9) and not sub-section (8) would be attracted. We also heard elaborate argument as to whether the assessments for 1946-47 and during 1939 to 1942 could be treated as "assessments" of the petitioner for the purpose of section 18-A (3). Learned counsel on the other side also made elaborate submissions on the points we have set out earlier as having been raised before us. In view, however, of a certain fact, which emerged on an examination of the records, we find that a discussion on most of these points has become unnecessary. This fact was that from the assessment year 1933-34 upto and including 1938-39 a firm called S.Rm.M.Ct.M. firm carrying on business at Madras, was treated as the agent of the petitioner, then a non-resident corporation, and the income of the petitioner accruing and arising in British India was assessed in the hands of this resident-agent the firm. That this was an assessment of the petitioner-company during those years was not the subject of dispute. It was also common ground that there was no demand by the Income-tax Officer under section 18-A (1) requiring the petitioner to pay in advance the tax. No doubt the existence of this assessment was not brought to the notice of the Income-tax Officer or the Commissioner, but as the truth of this fact was not in dispute, we do not consider that the petitioner is disentitled to rely on this for disputing its liability to pay interest.

The point urged by learned counsel for the department was that section 18-A (1) and 18-A (3) should be construed as complementary to each other, and that section 18-A (3) should be held to lay an obligation upon every person to submit an estimate of his income and pay tax in advance, where the Income-tax Officer was precluded from making a demand under section 18-A (1). To understand this argument it is necessary to advert to the scheme of section 18-A (1). The Income-tax Officer is directed to base his demand for computing the tax payable in advance on the total income of "the latest previous year in respect of which the person has been assessed". (We are leaving out of account the reference to the minimum amount of the income as irrelevant to the present context.) So long as the total income assessed in each year is above the minimum prescribed there can be no doubt, that unless the Income-tax Officer makes a demand for the advance payment of the tax, there is no obligation on the assessee to pay, and there would be no default on his part attracting the liability to pay interest under sub-section (8). Suppose, however, the total income for

the second year falls below the minimum or there is a computation of loss. If during the year following such an assessment the total income of the assessee is Rs. 6000 or upwards the Income-tax Officer cannot make a demand under section 18-A (1) because the *latest previous year* for which the person had been assessed disclosed a total income less than the minimum. The submission of learned counsel for the Department was that an assessee in such a position should be held to be "a person who has not hitherto been assessed" within the opening words of section 18-A (3) and was therefore bound to voluntarily submit an estimate of his income for that year and pay the tax due on such estimate. We feel unable to accept this construction of section 18-A (3). What in effect learned counsel for the department submits is that we should read the words "or in regard to whom the Income-tax Officer cannot make a demand under sub-section (1)" after the opening words of sub-section (3) we have extracted earlier. It is obvious that sub-section (3) does not cover every case where the Income-tax Officer is not enabled to make a demand under sub-section (1), but this is not a gap assuming that it was not designed which could be remedied by any process of construction. The result is that we must hold that the petitioner was not a person who had not *hitherto* been assessed, since it was admittedly assessed to tax during the period 1933-34 to 1938-39. The fact that during the period 1939-40 to 1950-51 it was not assessed to tax does not bring it within section 18-A (3).

If the petitioner was not bound to have voluntarily submitted an estimate within section 18-A (3), it is common ground its case could not fall within section 18-A (8). The demand for interest was therefore without legal basis.

The writ petition is accordingly allowed and the rule is made absolute. The order of the Income-tax Officer, dated 29th March, 1956, levying the assessment on the petitioner is set aside.

In view, however, of the assessments for 1933-34 to 1938-39 not being brought to the notice of the Income-tax Officer, there will be no order as to costs in this writ petition.

R.M. *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE SOMASUNDARAM.

Govindan .. 2nd Accused*.

Criminal Law—Practice—Payment of compensation to the accused—Legality.

When two accused persons are found guilty for the same offence and one is fined and the other is admonished and released, the Court has no jurisdiction in such cases to order payment of compensation to one of the accused out of the fine imposed on the other accused. The Code of Criminal Procedure does not contemplate giving of compensation by one acused to the other accused.

Case of the 2nd Accused in N.C. No. 12282 of 1957 on the file of the Special Honorary Presidency Magistrate, G.T., Madras, taken up by the High Court under section 439, Criminal Procedure Code, on a perusal of the record in the said N.C. No. 12282 of 1957.

B. Lakshminarayana Reddy, for accused No. 1.

The Public Prosecutor (*P. S. Kailasam*) for State.

The Court made the following

ORDER.—These revisions have been taken up by the High Court. Accused 1 and 2 were charged by the police under section 75 of the City Police Act. Accused 1 pleaded guilty and has been sentenced to pay a fine of Rs. 25. Accused 2 did not plead guilty but stated that he was employed under accused 1 and his salary for 28 days was due to him from accused 1. He was beaten by accused 1 when he went and demanded wages. No evidence has been let in on the side of the prosecution in support of the charge under section 75.

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* Cr. C. No. 570 of 1957 & 59 of 1958. (Taken up Nos. 6 of 1957 and 1 of 1958.) 22nd January, 1958.

So far as accused 1 is concerned in view of his plea of guilty his conviction will have to be confirmed. So far as accused 2 is concerned, as he has not pleaded guilty and as there is no evidence let in to prove that he also behaved in a disorderly manner in a public place he cannot be found guilty of the offence under section 75. The conviction of accused 2 is therefore set aside.

The learned Honorary Presidency Magistrate while sentencing accused 1 to a fine of Rs. 25 has ordered compensation to be paid to accused 2. Out of the fine, if collected, he directed that a sum of Rs. 10 should be paid to accused 2. In the absence of any evidence to show that the second accused was guilty of disorderly behaviour there is no reason why the Court should not accept the statement of accused 2 that he was beaten by accused 1 when he demanded wages due to him. The Honorary Magistrate found that he had bleeding injuries on his person. The beatings by accused 1 is established by the plea of guilty by accused 1.

In the view of the Magistrate the second accused was also guilty of the offence. The second accused was admonished and released. When two accused are found guilty for the same offence the Code does not contemplate giving compensation by one accused to the other accused. The trial Court has therefore no jurisdiction to award compensation out of the amount collected from accused 1 to be paid to accused 2. The order of compensation has therefore to be set aside and is hereby set aside.

So far as accused 1 is concerned he has been asked to execute a bond for Rs. 50 to keep the peace for 18 months. I think that a period of nine months will meet the ends of justice. The period of bond will, therefore, be reduced to nine months.

R.M. *Order varied and Order of compensation set aside.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE RAMASWAMI.

R. Ramakrishna Iyer .. *Appellant**

v.

Municipal Council, Tirunelveli, by Commissioner .. *Respondent.*

Madras District Municipalities Act (*V of* 1920), *sections* 244 *and* 249—*Scope—Premises (like railway platform) in the control and occupation of the Union Government—Private individual carrying on trade thereon—Whether exempt from the levy of licence fee.*

Though the premises may be the property of the Union Government, still so long as it is in the territorial limits of a Municipality, the Municipality has jurisdiction to regulate and license the trade carried thereon by a private individual.

The exemption granted under section 244 of the Act can only apply to activities carried on by the Government or the enumerated statutory bodies and not to private individuals carrying on a trade requiring a licence even though such trade might be carried on in the premises or the land owned by Government.

Alangavaran Chetty v. *The Municipal Council of Pollachi* (1957) 2 M.L.J. 56, followed.

Appeal against the Decree of the Court of the Subordinate Judge, Tirunelveli, in Appeal Suit No. 21 of 1954, preferred against the Decree of the Court of the District Munsif of Tirunelveli in Original Suit No. 172 of 1953.

S. Gopalaratnam, for Appellant.

T. K. Subramania Pillai, for Respondent.

The Court delivered the following

JUDGMENT.—The point involved in this Second Appeal, which arises from a suit for a declaration that the plaintiff is exempt from taking out any licence and

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* S.A. No. 354 of 1955. 6th September, 1957.

paying any licence fees for the vegetarian light refreshment stall in Tirunelveli railway junction platform, is that where the premises of a stall are under the control and occupation of the Central Government, sections 244 and 249 of the District Municipalities Act stand in the way of levy of any fee. In a recent decision of this Court in *Alangavaran Chetty* v. *Municipal Council of Pollachi*[1], it was held as follows :

"The exemption granted by section 244 of the District Municipalities Act from its licensing provisions in section 249 is only in favour of the activities of the Government and of the statutory bodies named in that section. Running a tea-stall even though on a railway platform under licence from the railway authorities, requires a licence from the Municipality under the District Municipalities Act. Though the railway premises may be the property of the Union Government, still so long as it is in the territorial limits of a Municipality, the Municipality has jurisdiction to regulate and licence the trade carried thereon.

Even though the language of section 244 of the Madras District Municipalities Act is different from the language of the analogous sections of the City Municipal Act and the Madras District Boards Act, still having regard to the legislative history of the licensing regulations and having regard to the need to avoid an interpretation which might lead to patent absurdity, the exemption granted under section 244 of the Act can only apply to activities carried on by the Government or the enumerated statutory bodies and not to private individuals carrying on a trade requiring a licence, even though such trade might be carried on the premises or land owned by Government. It is the activity that is carried on that attracts the licensing provisions and regulation under section 249. *Public Prosecutor* v. *Alangaram Chettiar*[2], followed."

Therefore, there is no substance in this point and this appeal has got to be dismissed and is hereby dismissed, but in the circumstances without costs.

V.S. ——— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE BALAKRISHNA AYYAR.

V. Ratna Mudaliar (*died*) and others .. *Petitioners**

v.

The Cantonment Board of St. Thomas Mount, by its Executive Officer .. *Respondent.*

Cantonment Act (II of 1924), section 203—Power of a Cantonment Board to levy license fees for opening of a market—If includes a right to collect licence fee for renewal of licence.

Section 203 (1) of the Cantonment Act, 1924, no doubt empowers a Cantonment Board to levy a license fee to open a private market. That means that when once a license is granted and a market is opened section 203 (1) will cease to apply. The term 'open' in section 203 (1) will apply only to the first or initial opening of a market and it cannot be construed in an artificial way to apply to every year when a licence is sought to be renewed. The distinction between 'opening a market' and 'keeping open a market' is clearly recognised by the analogous statutes like the City Municipal and District Municipal Acts. Hence a Cantonment Board is not entitled to charge any fees for the renewal of a licence to keep open a market when once the market has been 'opened' initially in pursuance of a license.

Petition under Article 226 of the Constitution of India, praying that in the circumstances stated therein, and in the affidavit filed therewith the High Court will be pleased to issue a writ of *mandamus* directing the respondent to allow the petitioner to keep his Pallavaram market at Pallavaram open without calling upon him to pay annual licence fee.

C. Vasudevan, for Petitioners.

The Government Pleader (*B. V. Viswanatha Ayyar*), for Respondent.

The Court made the following

ORDER.—The petitioner together with his brothers purchased the property known as the Pallavaram Private Market under a sale-deed, dated 9th October,

1. (1957) 2 M.L.J. 56.
2. (1955) 2 M.L.J. 555.

* W.P. No. 670 of 1956. 2nd January, 1958.

1930. This property is situate within the limits of the Cantonment of St. Thomas Mount. By arrangement with his brothers the petitioner has been managing this market. Year after year he has been taking out an annual licence from the Cantonment Board after paying the prescribed licence fee demanded by the Board. The last of the licences was for the period from 1st April, 1955, to 31st March, 1956 and for the issue of this licence the Cantonment Board charged a fee of Rs. 440 being eight per cent. of the gross income received by the petitioner from the market. By a resolution, dated 30th April, 1956, the Cantonment Board decided to increase the licence fee from eight to ten per cent. of the gross income derived from the market on the ground that the expenses incurred by the Board was far in excess of the licence fee that it had been collecting. The petitioner was called upon to pay the increased licence fee but he refused to do so. As a consequence the Cantonment Board refused to renew his licence. The petitioner has now come to this Court for the issue of a writ of *mandamus* to direct the Cantonment Board to issue a licence to him in relation to the market.

Two points have been taken by the petitioner. The first is that the Cantonment Board is entitled to charge fees only for the "opening" of a market and that it has no authority or power to charge any fees for the renewal of a licence already issued for opening a market. The second is that in asking for the enhanced licence fees the Cantonment Board acted in excess of its powers and converted the licence-fee into a source of revenue which it is not entitled to do. Mr. Vasudevan, the learned advocate for the petitioner argued, only the first point. According to him the Cantonment Board can charge a fee only for the "opening" of the market, that is, for the initial opening and it cannot charge any fees for the renewal of the licence. I think this contention of his is sound. Section 203 of the Cantonment Act (II of 1924) empowers a Cantonment Board to charge licence fees to open a private market. So far as it is now relevant the section runs as follows :—

"A Board may charge such fees as it thinks fit to impose for the grant of a licence to any person to open a private market—in the cantonment and may grant such licence subject to such conditions consistent with this Act and any bye-laws made thereunder as it thinks fit to impose."

It will be noticed that the section covers only licences to open a market. It is only at that stage that the Cantonment Board has been given power to charge a fee. Once the licence is granted and a market is opened section 203 (1) ceases to apply. It will be appreciated that when a market is opened and it is continued year after year it will not be correct or appropriate to speak of the market being "opened" every year. It seems to me that to do so would be a very artificial way of construing the word 'open' occurring in section 203 (1) of the Act. The learned Government Pleader argued that when a licence is granted for a particular term and that term expires and the licence is then renewed, it will be proper to speak of the market as being "opened". I find it difficult to agree. If this view were right it will be equally proper to speak of the market being opened not merely year after year but month after month or even day after day. I am inclined to read the word "open" in section 203 (1) of the Act as applying only to the first or initial opening of a market.

An examination of section 210 of the Act strengthens this view. Sub-section (1) of that section enumerates the classes of persons who cannot ply their trade in a cantonment area without obtaining a licence. Sub-section (2) enacts that a licence granted under sub-section (1) shall be valid until the end of the year for which it is issued. Sub-section (4) entitled the Board to charge fees for the grant of licences. Reading section 210 as a whole it is clear that the Cantonment Board is entitled to charge annual fees for the licence it issues under section 210 but I can see no such power under section 203 (1) of the Act. The contrast is important.

I do not doubt that under section 203 the Cantonment Board when issuing a licence can say that it will be tenable only for a particular period since under sub-section (1) it can impose such conditions as it thinks fit. To prescribe a period for which a licence will be valid would be a power falling within these words but under the guise of this power it seems to me that the Board cannot say that on the

expiration of the particular period the market is being "opened". It became 'open' when the first licence was granted and the market began first to function. Sections 208 and 280 of the Act empower the Board and the Central Government to make bye-laws and rules under the Act. These sections, however, do not confer power on the Cantonment Board to charge fees for the renewal of a licence issued under section 203.

It is interesting to contrast the words used in the corresponding provisions of the Madras City Municipal Act, the District Municipalities Act and the Local Boards Act. Section 304 (1) of the Madras City Municipal Act, 1919, runs as follows:

> "No person shall without or otherwise than in conformity with an annual licence granted by the Commissioner in this behalf continue to keep open a private market. Application for the renewal of the licence shall be made not less than forty-five and not more than ninety days before the commencement of the year for which licence is sought."

Then follow provisions for the charging of fees for the issue of licences. In other words, while the City Municipal Act gives specific powers for charging fees for keeping open a market no such power is conferred on the Cantonment Board in respect of keeping open a private market under this Cantonment Act.

The language of sections 171 and 174 of the District Boards Act is even more striking. Section 171 (1) runs thus:—

> "No person shall in any non-panchayat area, open a new private market or continue to keep open a private market unless he obtains from the district board a licence to do so. The words of section 262 of the District Municipalities Act are practically the same."

The distinction, therefore, between opening a market and keeping open a market is one which is well known to the statute-book. When, therefore, section 203 of the Cantonment Act makes provision only for charging fees for the opening of a private market advantage cannot be taken of it to charge fees for keeping the market open under the guise of renewal fees because in such a case there is no opening of any fresh market.

The learned Government Pleader strongly argued that the Cantonment Board can issue a licence for a term and then at the end of that term it can charge fees again for the renewal of the licence because on the expiration of the specified term there would be the "opening" of the market. But as I said before that would be a very artificial way of reading the words of the section. A licence may be given for the running of a hotel or eating-house for a period of one year and if at the end of the year the licence for the hotel or the eating-house is renewed it would scarcely be right to say that a new hotel or eating-house has been "opened". The learned Government Pleader referred me to sections 204 and 205 of the Cantonment Act. In my view the provisions of these sections do not help him. On the other hand they are really against him because section 204 (1) speaks of persons who keep open for public use any market or slaughter-house in respect of which a licence is required.

Similarly section 205 which runs:—

> "Whoever knowing that any market or slaughter-house has been opened to the public without a licence having been obtained therefor when such licence is required by . . . . . ."

The language of these two sections makes it plain that the framers of the Act kept in mind the distinction between the opening of a market and the keeping open of a market.

In my view, the objection taken by Mr. Vasudevan is sound and the Cantonment Board is not entitled to charge any fees for the renewal of the licence in this case. The Board is entitled only to charge fees for the opening of a market, that is, the initial opening of a market and not for the subsequent keeping open of a market.

The petition is allowed and the rule is made absolute. A writ will, therefore, issue directing the Cantonment Board to issue a licence to the petitioner without calling upon him or requiring him to pay any fees for the renewal of the licence. The petitioner will be entitled to his costs. Counsel's fee Rs. 100.

R.M. ——— *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE BALAKRISHNA AYYAR.

S. K. Umapathi .. *Petitioner**

v.

A. V. Panchaksharam Pillai and another .. *Respondents.*

Madras Cinemas (Regulation) Act (IX of 1955), *section* 5—*Scope of.*

Constitution of India (1950), *Article* 226—*Jurisdiction under—Nature and scope of.*

Section 5 of the Madras Cinemas (Regulation) Act, 1955, no doubt, enumerates certain considerations which the licensing authority is bound to take into account. But it does not exhaustively enumerate all the considerations which the licensing authority may take into account. The mere fact therefore that the licensing authority took into account circumstances not covered by the categories enumerated in section 5, will not, by itself, vitiate the order of the licensing authority. It is of course to be borne in mind that when once the authority takes into consideration matters not expressly enumerated in the statute it enters into a territory where controversy may become inevitable.

Where between two rival applicants for a license to run a touring cinema the Collector chose one on the ground that the other had already a chance and that everybody should have a chance, when all other considerations are equal, it cannot be said that the consideration taken into account is an unreasonable one.

The jurisdiction of the High Court under Article 226 of the Constitution is a correctional one and the Courts has a discretion to interfere or not to interfere with an order. Where it is clear that the authority whose order is sought to be impeached has applied its mind fairly, honestly and impartially and has reached a conclusion which is neither unjust nor improper, the High Court will be slow to interfere with such an order.

Petition under Article 226 of the Constitution of India, praying that in the circumstances stated therein, and in the affidavit filed with W.P. No. 914 of 1957 on the file of the High Court, the High Court will be pleased to issue a writ of *certiorari* calling for the records in R.C. No. 5960 of 57-C-4, dated 19th October, 1957, on the file of the Collector of Tanjore in respect of the cinematograph licence in Modakur South Village, Tanjore District, and quash the said order, granting licence to the 1st respondent herein and refusing licence to the petitioner herein respectively.

G. R. Jagadisan and *T. S. Srinivasan*, for Petitioner.

The Additional Government Pleader (*K. Veeraswami*), *R. M. Seshadri* and *R. Sundaralingam*, for Respondents.

The Court made the following

ORDER.—Umapathi, the petitioner herein, is the Manager, of the Vijayalakshmi Touring Talkies in Modakur. On 9th November, 1956, he applied to the Collector of Tanjore for the issue of a 'no-objection' certificate under the Madras Cinemas Regulation Act, 1955, in order that he might erect a touring cinema in R.S. No. 540/2 of Modakur village. The rules framed under the Act require that there should be open space not less than 60 feet wide on all sides of a cinema-shed. As R.S. No. 540/2 did not satisfy this requirement, the Collector rejected the application of Umapathi. His appeal to the Board having failed he went up in revision to Government. In G.O. Ms. No. 1639 (Home) dated 14th June, 1957, the Government granted exemption to the Vijayalakshmi Touring Talkies from the operation of the 60 feet rule. Fortified by this exemption, Umapathi applied again on 19th June, 1957, to the Collector of Tanjore for the issue of a 'no-objection' certificate and on 21st June, 1957, the Collector granted the certificate to him. Meantime, that is to say, on 26th April, 1957, Panchaksharam Pillai, the first respondent herein, and the Manager of the Sri Ayyappan Talkies had applied for a 'no-objection' certificate in order to construct a touring cinema in R. S. No. 461/1 of Modakur village. Now, as R.S. No. 461/1 is less than four furlongs away from R.S. No. 540/2 in respect of which a licence has been granted to Umapathi, the Collector rejected the application of Panchaksharam Pillai. He, therefore, came to this Court in W.P. Nos. 502 and 513 of 1957. This Court held that since

* W.P. Nos. 914 and 915 of 1957. 5th February, 1958.

on 21st June, 1957, the Collector had before him both the applications of Umapathi and Panchaksharam Pillai he should have considered the relative merits of the applicants and thereafter passed an order on the merits of the case and that he was wrong in having rejected the application of Panchaksharam Pillai on the ground that a licence had already been granted to Umapathi. An appeal taken against the orders in W.P. Nos. 502 and 513 of 1957 failed. The licence which the Collector had granted to Umapathi was for a period of three months only and expired on 25th September, 1957. Both Umapathi and Panchaksharam Pillai filed fresh applications for the issue of a license for their respective sites for the period subsequent to 25th September, 1957. The Collector heard the advocates on both sides and on 19th October, 1957, passed an order granting a license to Panchaksharam Pillai and in consequence rejected the application of Umapathi. Umapathi now seeks to canvass the propriety of these orders in these writ petitions.

Section 5 of the Madras Cinemas (Regulation) Act directs that in deciding whether to grant or refuse to grant a license the licensing authority shall have regard to various matters specified therein. One of these matters is "the previous experience of the applicant". By virtue of the license which Umapathi obtained on 21st June, 1957, he had as against Panchaksharam Pillai the advantage of three months' experience. But the Collector considered that as that experience had been obtained on the strength of a license which the High Court held had been irregularly issued that circumstance could not be counted in his favour. As regards the suitability of the two sites he found that both were suitable. He expressed the view:

"Thus I find that I cannot make a proper selection among the applicants by applying the provisions of section 5 of the Act but I must select and select one applicant only."

and he preferred Panchaksharam Pillai for these two reasons. R.S. No. 461/1 which was the site selected by Panchaksharam Pillai satisfied in its own right the requirement of the 60 feet rule whereas the site R.S. No. 540/2 could only be considered to satisfy the rule by virtue of the exemption which the Government had granted. The Collector was also of the opinion that running temporary cinemas was a paying business for which there was keen competition and that it was only fair and reasonable that

"opportunities are conferred on as many applicants as possible instead of restricting the same to a few applicants repeatedly."

Mr. G. R. Jagadisa Aiyar, the learned Advocate for the petitioner, contended that section 5(*b*) of the Madras Cinemas (Regulation) Act which directs the licensing authority to take into consideration the previous experience of the applicant does not say that the experience should have been obtained in a particular manner and that, therefore, the Collector was wrong in ignoring the prior experience of Umapathi merely because it had been obtained on the strength of a license which this Court held had been irregularly granted. This criticism of Mr. Jagadisa Aiyar is well founded as it is supported by the decision in Writ Appeal No. 121 of 1956. But at the same time it must not be overlooked that the experience which Umapathi had obtained was only relatively short, a point which the Collector has noticed in his order.

Mr. Jagadisa Aiyar next stated that, as a matter of actual fact, Umapathi has much longer experience and that the Collector should have held an enquiry into this aspect of the matter since the statute requires him to take into account the previous experience of the applicant. Now when a candidate applies for any post, one would normally expect him to state what his qualifications and attainments are and, if he has any previous experience which might influence the selecting authority in his favour to give particulars thereof. One does not expect the selecting authority to go round investigating matters of this kind on its own. This investigation would normally be confined to ascertaining whether the claims put forward by the applicant are true and good. In like manner if Umapathi had prior experience which he wanted the Collector to take into account, it was for him to have mentioned what that experience was and the particulars relating to it. It is not as though the parties to this dispute had no legal assistance when the

matter was taken to the Collector because that officer mentions in his order that he heard the Advocates on both sides. If, therefore, Umpathi had prior experience which he wanted the Collector to take into account it was for him to have placed the relevant material before the Collector and if he failed to do so he has only to thank himself. Mr. Jagadisa Aiyar insisted that the Collector should have made his own enquiries. This at once raises the question : in what form was he to make the enquiry? Was that enquiry to be made in the presence of the competing candidate or was the Collector to call for a report from his subordinate officers? If he decided to call for a report from his subordinate officers and those reports were adverse to Umapathi, was Umapathi to be given a chance to contradict them? And if so in what manner? On the other hand, if the report was favourable to Umapathi, how was Panchaksharam Pillai to controvert that? The Act does not provide for any of the matters. The Collector cannot be blamed for refusing to embark on such an enquiry. As I said before, if Umapathi had previous experience and he wanted the Collector to take that into account he should have placed the relevant circumstances before the Collector.

A second reason which the Collector assigned for finally preferring Panchaksharam Pillai is that it appeared to him to be fair and reasonable that opportunities should be conferred on as many applicants as possible. In allowing himself to be influenced by such a consideration, said Mr. Jagadisa Aiyar, the Collector was taking into account a circumstance which was not germane to the matter which he had to decide and when an authority does that, its decision ought to be interfered with. In support of this view he referred to *Reg* v. *Bowman*[1], *Reg* v. *Cotham*[2], and *Roberts* v. *Hopwood*[3]. Anticipating the objection that even if these considerations were ruled out the order of the Collector can be supported for the other reason he had given, Mr. Jagadisa Aiyar stated that where a number of reasons have been given for making a particular order and all these seem to have operated on the mind of the licensing authority and it is not possible to say that the reason which is irrelevant did not influence his decision, the decision itself must be set aside. Vide *Dwaraka Das* v. *State of J. and K.*[4], and also *Messrs. S. N. Transport Company* v. *State Transport Authority*[5], where it is stated :

> "If a statutory body is actuated by any extraneous and irrelevant consideration in giving effect to the provisions of the statute under which such statutory body is created, then such an act will be regarded as one done in excess of jurisdiction."

See also *R.* v. *Fulham, etc: Rent Tribunal*[6], the learned Chief Justice observed :

> "If it can be shown that an inferior tribunal has come to its decision by taking into account matters which it ought never to have taken into account and are virtually extraneous to what they have to decide, that is a ground for granting *certiorari*."

The first observation to make on this criticism of Mr. Jagadisa Aiyar is that section 5 of the Madras Cinemas (Regulation) Act merely enunciates certain considerations which the licensing authority is bound to take into account. It does not exhustively enumerate all the considerations which the licensing authority may take into account. If, therefore, a licensing authority may take into account, circumstances not covered by the categories enumerated in section 5 that, by itself, will not be a ground for interfering with its decision. At the same time, I have to observe that when a licensing authority takes into consideration matters not expressly enumerated in the statute it enters into territory where controversy may become inevitable. Considerations which may seem to be fair and just to one school of thought may appear to be revolutionary to another and reactionary to a third. Nevertheless it does seem a little difficult to say that the consideration which the Collector took into account is an inequitable or unreasonable one. The view 'Let everybody have a chance, is one which will be found to commend itself to a large section of thought. In fact, this idea is given effect to on the administrative side of this Court. Usually care is taken to see that in the matter of Commis-

1. L.R. (1898) 1 Q.B.D. 663.
2. L.R. (1898) 1 Q.B.D. 802.
3. L.R. (1925) A.C. 578.
4. (1957) S.C.J. 133.
5. A.I.R. 1957 Cal. 638.
6. (1953) 2 All E.R. 4 at 6.

sions, receiverships and the like, there is a fair distribution of this kind of work, they are not repeatedly given to the same individual. In the questionnaire prepared by this Court for the inspection of Subordinate Courts, a question is included which requires inspecting officers to ascertain whether commissions and the like are fairly distributed. This has been so for several years and one can hardly find fault with the Collector for having taken into account a consideration which has had the approval of this Court for so may decades. But at the same time I recognise that there is force in the criticism of Mr. Jagadisa Aiyar that one consideration which is set out in the order of the Collector is irrelevant to the question he had to decide.

It is clear that the Collector found it difficult to choose between these two persons because their relative merits were substantially equal. But, as he said, he had to make a selection. Now one reason which the Collector gave for preferring Panchaksharam was that the site R.S. No. 461/1 for which he asked for a license satisfied in its own right the requirement of the 60 feet rule whereas R.S. No. 540/2 did not and an exemption from the rule had to be obtained. If he had rested his conclusion on that ground it would have been difficult to interfere with his order. If an appointing authority were to prefer a person who has passed an examination to another who has been exempted from passing the examination, it would be difficult to say that his preference was wrong. The fact that he gave another reason which is irrelevant to the question he had to decide does not detract from the strength of the other reason.

The jurisdiction of this Court under Article 226 of the Constitution is a correctional jurisdiction. Though its discretion must be judicially exercised the Court has still a discretion to interfere or not to interfere and where it is clear that the authority whose order is sought to be impeached has applied its mind fairly, honestly and impartially, and reached a conclusion which cannot be said to be unjust or improper, this Court will be very slow to interfere.

I do not see sufficient reason to disturb the decision of the Collector. These petitions are dismissed with costs in W.P. No. 914 of 157. Advocate's fee one set Rs. 100.

R.M. ——— *Petitions dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. P. RAJAGOPALAN, *Officiating Chief Justice* AND MR. JUSTICE GANAPATIA PILLAI.

P. M. Swamy .. *Appellant**

v.

K. Sultan Mohideen .. *Respondent.*

Trade Marks Act (V of 1940), sections 20 and 73—Scope—Forum for institution of suits—If section 73 applies to passing-off actions also—City Civil Court—If has jurisdiction.

The combined effect of sections 20 and 73 of the Trade Marks Act, 1940, is that a suit to prevent an infringement of a trade mark or for damages for such infringement cannot be instituted at all unless the trade mark is registered. Under the provisions of the Act and even in the case of infringement of registered trade marks such a suit cannot be instituted in any Court inferior to that of a District Court having the requisite jurisdiction such as territorial jurisdiction. Section 20 (2) of the Act no doubt excludes passing off actions from the provisions of the Act. But what is saved under section 20 (2) is only the right of action and it has no bearing on the forum mentioned in section 73. Hence section 73 will apply to passing off actions also and the expression 'otherwise relating to any right in a trade mark' in the section is wide enough to include passing off actions also, where the alleged misuse of a registered trade mark is in issue. Hence such a suit cannot be instituted in the City Civil Court Madras, which is not a District Court within the meaning of the section.

A decree of the City Civil Court, Madras, in a suit in which the cause of action is based either wholly or in part on the infringement of a trade mark will be a nullity and the execution Court can look into the pleadings to decide whether the Court had jurisdiction to pass the decree.

Appeals against the Orders the Additional Judge, City Civil Court, Madras, dated 20th September, 1956 and made in C.M.A. Nos. 16 and 15 of 1955 respectively

* A.A.A.O. Nos. 12 and 13 of 1957. 23rd January, 1958.

(E.A. Nos. 3595 and 3479 of 1952 respectively, E.P. No. 2010 of 1952 in O.S. No. 1394 of 1950).

C. Srinivasachari and *T. R. Sundaram*, for Appellant.

A. Durairaj, for Respondent.

The Court delivered the following

JUDGMENT.—The second appeals came up before us on a reference by one of us, as the main question involved, the extent to which section 73 of the Trade Marks Act governed the forum for instituting suits in a passing off action, in respect of goods covered by a registered trade mark, was not settled by any decision of this Court. The appeals themselves arose out of proceedings in execution of the decree in O.S. No. 1394 of 1950 on the file of the City Civil Court. The defendant, judgment-debtor under that decree, is the appellant before us. The decree in that suit was ultimately passed *ex parte* the defendant. The decree granted the following reliefs, which were what the plaintiff had specifically asked for :

"(1) that the defendant do pay the plaintiff a sum of Rs. 100 as and for damages ;

(2) that the defendant, his agents, or dealers or servants, be and are hereby restrained by injunction from manufacturing selling or offering for sale snuff under the offending trade name, trade mark, label or any other colourable imitation of the plaintiff's trade name, trade mark, label and design ;

(3) that the defendant be and is hereby directed to surrender all the pamphlets, letter heads cash memos, order books, labels and printing designs and signboards disclosing the offending trade name, label and design ;

(4) that the defendant do pay the plaintiff a sum of rupees 53-8-0 as and for the costs of suit...."

The claim in the plaint was that the plaintiff was a reputed snuff manufacturer since 1920, and that his product was being marketed under the trade name K. S. Sahib's Snuff Factory and under the trade mark comprising the words K. S. Madras Snuff' packed in labels of special design and colour containing a pictorial representation. That trade mark was registered by the plaintiff under the Trade Marks Act, 1940. The reliefs the plaintiff sought were set out in paragraphs 15 to 18 of the plaint and were summarised in sub-paragraphs 1 to 4 of paragraph 22 of the plaint. Paragraphs 2 to 15 of the plaint contained allegations on proof of which the plaintiff claimed he was entitled to the reliefs mentioned above.

A reading of the plaint taken as a whole left no room for doubt, that the cause of action was also based upon the alleged infringement of the trade mark, which was undoubtedly registered in the name of the plaintiff under the Trade Marks Act. In paragraph 6 of the plaint the plaintiff averred :

" Under the provisions of the Act, plaintiff is the registered owner and proprietor of the said trade mark entitled to legal protection in respect of infringement of his rights and against colourable imitations thereof."

Paragraph 12 of the plaint ran :

"Plaintiff states that in consequence of the infringement committed by the defendant and being committed from day-to-day the plaintiff's trade reputation was adversely affected and is likely to be further affected."

In continuation of that the plaintiff averred in paragraph 13 :

" In spite of the alteration suggested by the defendant in the trade mark comprising of the label and design, the defendant is wrongfully continuing to use the offending trade name, trade mark label and design and is persisting in his colourable limitation and infringement of the plaintiff's rights."

Thus the specific plea was that the defendant's acts constituted an infringement of the registered trade mark of the plaintiff.

It was common ground that in execution of the decree the plaintiff obtained, which as we said was *ex parte* the defendant, the plaintiff decree-holder realised the sum of Rs. 100 awarded as damages under clause (1) of the decree and the costs awarded in clause (4). Subsequently, the plaintiff decree-holder filed E.P. No. 2010 of 1952 to execute clause (3) of the decree and to obtain an order for the seizure

of the offending labels. The executing Court ordered the seizure. Before that order could be executed, the defendant filed E.A. No. 3479 of 1952, wherein he prayed that the order to seize the labels should be set aside. The main plea taken at that stage was that the decree under execution was a nullity, as the Court of the City Civil Judge which had granted the decree had no jurisdiction to entertain the suit; section 73 of the Trade Marks Act barred any such assumption of jurisdiction.

The objection of the defendant judgment-debtor was upheld by the executing Court. E.A. No. 3479 of 1952 was allowed, with the result that E.P. No. 2010 of 1952 was dismissed. The plaintiff decree-holder appealed. The Additional City Civil Judge, who heard both the appeals, differed from the learned trial Judge, and held the suit had been properly laid in the City Civil Court, because it was in the main an action for passing off the defendant's goods as the goods of the plaintiff. The learned appellate Judge set aside the orders of the executing Court and directed execution to proceed in E.P. No. 2010 of 1952. It was against the orders of the appellate Court that the Civil Miscellaneous Second Appeals now before us were preferred.

To appreciate the scope of the contentions of the learned counsel on either side it may be desirable to set out the statutory provisions on which the arguments were based. The relevant portion of section 20 (1) is:

> "No person shall be entitled to institute any proceeding to prevent, or to recover damages for the infringement of an unregistered trade mark. . . . . . . (the rest of the section may not be material for our present purposes. As we said we are dealing with the case of a registered trade mark)."

Section 20 (2) runs:

> "Nothing in this Act shall be deemed to affect rights of action against any person for passing off goods as the goods of another person or the remedies in respect thereof."

Section 73 runs:

> "No suit for infringement of a trade mark or otherwise relating to any right in a trade mark shall be instituted in any Court inferior to a District Court having jurisdiction to try the suit."

The statutory expression in section 73 is "suit for infringement of a trade mark or otherwise relating to any right in a trade mark." What section 20 (1) bars in relation to an un registered trade mark is "any suit or proceeding to prevent or to recover damages for the infringment of a trade mark."

Taking the three statutory provisions we have referred to above together the position seems to be this. A suit to prevent an infringement of a trade mark or a suit to recover damages for infringement of that trade mark cannot be instituted at all, unless that trade mark has been registered. This is subject to the further provision in section 20 (1) which, as we pointed out earlier, is not relevant for our present purposes. Such suits can therefore be filed only where the trade mark has been registered under the provisions of the Act. If the trade mark has been so registered, section 73 determines the forum for such suits, a civil Court not inferior to a District Court which otherwise has the requisite jurisdiction to try the suit, for example territorial jurisdiction. Section 20 (2) is a saving provision. What it saves is expressly stated in the sub-section:

> "Nothing in this Act shall be deemed to affect rights of action against any person for passing off goods as the goods of another person or the remedies in respect thereof."

What it saves is the right of action in what is familiarly known as passing off actions. To such actions none of the provisions of the Act including section 20 (1) and section 73 can apply. If the action is one for passing off goods or the remedies in respect thereof, the right of action is saved, whether a trade mark is involved or not, and, whether such a trade mark has been registered or not under the provisions of the Act.

The contention of Mr. Dorairaj, learned counsel for the respondent (plaintiff, decree-holder) was that, having regard to the allegations in the plaint, the suit was in the main one of the category known as passing off actions, and therefore though the cause of action was also based on an infringement of the rights of the plaintiff secured

to him by the registration of his trade mark, the plaintiff's suit was saved by section 20 (2) of the Act and fell outside the scope of the ban imposed by section 73 of the Act. We have already pointed out that the plaint contained express allegations, that the registered trade mark of the plaintiff and his rights threin were infringed by the conduct of the defendant, and the plaintiff sought relief on that basis also. Whether despite the apparently wide language of section 20 (2) such a suit came within the purview of section 73 of the Act is the question for determination.

In construing the scope of section 73 of the Act there is no room for the application of the well-settled principle of law, that if a civil Court is to be divested of its jurisdiction it should be by statutory provision which is either express in its terms, or which arises by necessary intendment. Section 73 does not divest the Civil Courts as such of jurisdiction even in the limited class of cases referred to therein, namely, suits for the infringement of a trade mark or otherwise relating to any right in a trade mark. The jurisdiction of the Civil Courts is maintained. Only the class of Courts, established under the Civil Courts Act, inferior in jurisdiction to a District Court, is excluded. Just as the Civil Courts Act for example defines the jurisdiction of the several classes or categories of civil Courts, section 73 of the Trade Marks Act designates the class of Courts in which the suits specified therein have to be filed, which alone have jurisdiction to try that class of suits.

Mr. Dorairaj urged that the scope of section 73 should be so construed as to avoid any conflict with section 20 (2) of the Act. He contended that section 73 did not apply to any passing off action, irrespective of the question whether in such a suit the infringement of a trade mark was complained of or not, and irrespective of the question whether such a trade mark was registered under the provisions of the Act or not.

In our opinion there is really no conflict between these two sets of provisions. Section 20 (2) is only concerned with staying the right of action. For purposes of section 20 (2), whether the trade mark in question was registered or not may not have any real bearing. Section 73 is not concerned with the right of actions as such. It only prescribes the forum where suits of the class specified in section 73 could be tried. If this distinction is borne in mind, there would appear to be no real conflict between the two sets of provisions.

The further contention of Mr. Doraraj was that even if an infringement of a registered trade mark was alleged and even if relief was sought on the footing of such an alleged infringement if the suit was a passing off action, section 73 would not apply to such a suit. We are unable to accept that contention. To accept that contention we will have to read further words of qualification into section 73. In effect we would have to read section 73 as if it ran ;

> "No suit for infringement of a trade mark or otherwise relating to any right in a trade mark other than a passing off action saved by section 20 (2) of the Act."

That would be to claim rights of legislation for a Court, while its duty is only to interpret. Besides, the expression "otherwise relating to any right in a trade mark" in section 73 would, in our opinion, include passing off actions also, where the alleged misuse of registered trade mark is in issue. In the present case it may not even be necessary to hold that the plaintiff's suit is one "otherwise relating to any right in a trade mark", that is a registered trade mark, within the meaning of section 73. We have already pointed out it was definitely a suit for infringement of a trade mark, because the plaintiff categorically averred infringement of his registered trade mark ; and his suit was to prevent the infringement of his registered trade mark by the defendant and also to recover damages for that infringement.

The suit filed by the plaintiff was no doubt an action for passing off the goods of the defendant as the goods of the plaintiff within the meaning of section 20 (2). But it was also a suit for the infringement of a trade mark or otherwise relating to any right in a trade mark within the meaning of section 73. The right of action was saved by section 20 (2). The liability to institute in the forum prescribed by section 73 was not saved in this case by recourse to the provisions of section 20 (2) of the Act,

This section 20 (2) was numbered as one of the sub-sections of section 20 can obviously have no real bearing in determining the scope of section 20 (2), particularly in relation to section 73 of the Act. The position would not have been any different had section 20 (2) been numbered as a separate section of the Act. In fact it stood by itself as section 45 in the earlier Act.

Whether in what is apparently a passing off action the plaintiff also alleges an infringement of his registered trade mark and seeks relief also on that basis, the suit would still be a suit for the infringement of a trade mark or otherwise relating to any right in a trade mark within the meaning of section 73 and would therefore fall within the scope of the ban imposed by that section is the real question for decision. In our opinion the plaintiff's suit fell within the scope of section 73. Mr. Dorairaj did not dispute the fact that the City Civil Court, Madras, was not a District Court or a Court superior to a District Court within the meaning of section 73.

The distinction between a passing off action and a suit for the infringement of a trade mark, to which Mr. Dorairaj invited our attention, has been well-defined by decisions of both English and Indian Courts. It may not be necessary to embark upon a discussion of the general principles or upon an examination of the case-law bearing on that point. As already pointed out by us the scope of the question we have to determine is much narrower. What is the position, if in a passing off action the plaintiff also alleges infringement of a registered trade mark; and if he does so, whether it is a suit for infringement of trade mark within the meaning of section 73. *Ranjit Lal* v. *Vidya Praksh*[1], and *Firm B. Dass* v. *Watkins M. & Co*[2], on which Mr. Dorairaj relied do not help us to answer that question.

Our attention was drawn to the decision of a Division Bench of the Allahabad High Court in *Tak Chand* v. *Western India Match Co.*[3]. We have reached the same conclusion but on a different line of reasoning.

To sum up this portion of the case, we hold that though the plaintiff's suit was a passing off action, it was also a suit for the infringement of a trade mark or otherwise relating to any right in a trade mark within the meaning of section 73 of the Act, and that the City Civil Court had no jurisdiction to entertain that suit taken as a whole. The decree in that suit was a nullity, because it was passed by a Court which had no jurisdiction.

The learned counsel for the respondent decree-holder next argued that the executing Court had no jurisdiction to go behind the decree and examine the pleadings and the issues framed in the case, to determine the question of the jurisdiction of the Court which passed the decree. The learned counsel urged that clause 2 of the decree which granted an injunction prohibiting the defendant from marketing his goods under the labels employed by him for that purpose could be equally granted in a passing off action also. In *Shanmugha Nadar* v. *Shanmughavel Nadar*[4], Patanjali Sastri, J., pointed out the distinction between the form of injunction which could be granted in a passing off action based upon any right in an unregistered trade mark or trade name and the injunction which could be granted in the case of an infringement of a registered trade mark. For the former case the injunction must be qualified by words prohibiting the defendant's use of the name or trade mark without taking reasonable precaution to distinguish his business or goods from that of the plaintiff. No such qualification would be needed where the infringement complained of was that of a registered mark. In the latter class of cases it is the statutory right that is asserted and a statutory remedy that is claimed. In this case the learned trial Judge granted an injunction without any qualification. The trade mark in question was a registered mark. The relief granted in paragraph 3 of the decree would not have been permissible, if the action

1. A.I.R. 1951 Simla 176.
2. A.I.R. 1956 Punj. 17.
3. A.I.R. 1955 All. 404.
4. (1940) 1 M.L.J. 749.

had solely been one for passing off. For this grant of that relief the seizure of pamphlets, etc., in the possession of the defendant offending the registered trade mark of the plaintiff, mere possession of such offending objects would not be enough. The plaintiff had to allege and prove that he had a proprietary right in the registered trade mark or trade name in question to justify the prayer for and the grant of the relief of seizure. This is a specific statutory right for which section 21 of the Act provides. As we have already pointed out, a reading of the plaint taken as a whole made it clear that the plaintiff based his cause of action also upon infringement of his registered trade mark. To consider whether the decree in question was a nullity, it was certainly permissible, in fact, it was necessary to consider with reference to this plaint, what the scope of the suit was in which that decree was granted. We are unable to accept the extreme contention put forward by the learned counsel for the decree-holder respondent, that the executing Court called upon to decide whether the decree under execution was a nullity, should not look into any document other than the decree under execution, and that it could only decide whether *ex facie* the decree showed lack of jurisdiction in the Court that passed it. In *Adinarayana Chetty* v. *Chengiah Chetty*[1], Venkataramana Rao., J. approved of an earlier decision of Pandrang Row, J., in *Srirangachariar* v. *Annamalai Chettiar*[2], where the jurisdiction of the Court to take evidence for the purposes of deciding whether the decree was a nullity was upheld. See also *Meenakshi Ammal* v. *Chidambaram Chettiar*[3]. No reported case was brought to our notice to show that the pleadings in the case should not be looked into by the executing Court to decide the question at issue, whether the Court had no jurisdiction at all to pass the decree.

In our opinion, the executing Court was right in its view, that the decree under execution was a nullity, because the Court of the City Civil Judge had no jurisdiction to entertain the suit as a whole. We allow the appeals, set aside the orders of the lower appellate Court and restore the orders of the executing Court in E.A. No. 3479 of 1952 and E. A. No. 3595 of 1952 in E.P. No. 2010 of 1952. The appellant will be entitled to one set of costs throughout.

R.M. *Appeals allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE RAJAGOPALAN.

The Management of India Tyre and Rubber Company (India) Private, Ltd. .. *Petitioner**

v.

The Workers of the India Tyre and Rubber Company (India) Private Ltd. represented by the Tyre and Rubber Companies Employees Union and another .. *Respondent.*

Industrial Disputes Act (XIV of 1947), section 25-G—Scope—Industrial Establishment—What constitutes—Retrenchment due to reorganization of methods of business—Whether made in good faith—Principles of social justice—If relevant factors.

The petitioner company has its head-office at Bombay and one of its branch offices is at Madras with jurisdiction over the territorial area known as Madras District which extends over areas outside the State of Madras. The sub-depots at Ernakulam, Bangalore and Vijayawada are within the District of Madras. A reorganization of its methods of business resulted in a reduction in the amount of the office-work in the Madras office in consequence of which the company retrenched twelve of its employees in the Madras office. On the question whether the retrenchment was in accordance with law and was done in good faith:

Held : The scheme of the Act envisages each as a distinct concept (1) an industry, (2) an industrial concern within an industry, (3) an industrial establishment, which may itself be the whole of the industrial concern or which may be a part of a larger industrial concern, (4) a section of an industrial establishment and (5) categories of workmen in an industrial establishment or in a section thereof.

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1. (1937) 46 L.W. 544.
2. (1935) 41 L.W. 485.
3. (1947) 1 M.L.J. 66 : 60 L.W. 41.

* W.P. No. 122 of 1957. 29th July, 1957.

The petitioner company is an industrial concern and the office at Madras is an industrial establishment. Each of the sub-depots in the different States is a separate establishment of that same industrial concern for the purpose of section 25-G of the Industrial Disputes Act.

Section 25-G makes it specific that the unit of the industry to which that principle governing retrenchment applies is the industrial establishment. There can be no scope for considerations of 'pooled seniority'.

The concept of social justice by which it was meant that if an employer wanted to get a return of more than 6 per cent. on his paid-up capital or more than 4 per cent. on his working capital a retrenchment was justified on the grounds of quantum of work available, would be one vitiated by bad faith, is an entirely irrelevant factor in considering whether a retrenchment was ordered in good faith or whether it only amounted to a colourable exercise of the power to retrench.

Thus the Tribunal was in error when it imported an irrelevant consideration in deciding whether the retrenchment was justified and when it failed to keep the requirements of section 25-G in view in deciding the retrenchment ordered by the company. The award has to be set aside under Article 226 of the Constitution.

Petition under Article 226 of the Constitution of India, praying that in the circumstances stated therein, and in the affidavit filed therewith the High Court will be pleased to issue a writ of *certiorari* calling for the records relating to the award of the Industrial Tribunal, Madras, in I.D. No. 27 of 1956, dated 17th December, 1956 and published at page 7 of the *Fort St. George Gazette*, dated 16th January, 1957 and quash the said award.

M. K. Nambiar and *K. K. Venugopal*, for Petitioner.

S. Viswanathan and *B. R. Dholia*, for Respondent No. 1.

G. Ramanujam for the Additional Government Pleader (*K. Veeraswami*) for Respondent No. 2.

The Court made the following

ORDER.—The petitioner company manufactures and sells tyres, among other rubber goods, in India. It has its head-office at Bombay. One of its branch offices is at Madras with jurisdiction over the territorial area known as Madras District. The District extends over areas which lie outside the State, in Kerala, Mysore and Andhra Pradesh. The sub-depots at Ernakulam, Bangalore and Vijayawada are within the District of Madras.

On the recommendation of the Tariff Commission in 1953, the Government of India ordered a reduction in the sale price of tyres by 10 per cent. The Tariff Commission pointed out in its Report that the proportion of administration, selling and distribution expense of the petitioner company was high, when compared with such charges incurred by other companies manufacturing and selling tyres in India. The petitioner company reorganised its methods of business, which resulted in a reduction in the amount of office work to be done in the Madras office. The petitioner found that to deal with the work on the reorganised basis twelve out of the thirty-three employees in the Madras office were in surplus of its requirements. On 22nd February, 1956, the petitioner company ordered a retrenchment of twelve of its employees and served each of the retrenched employees with a notice, paying each of them a month's wages in lieu of notice.

The Workers' Union challenged the right of the Management to terminate the services of these twelve employees. On 31st March, 1956, the dispute between the Management and the Workers was referred by the Government of Madras, under section 10 (1) (*c*) of the Industrial Disputes Act, for adjudication by the Industrial Tribunal, Madras. What was referred as an industrial dispute was :

"Whether the retrenchment of the following twelve workers is justified and to what relief they are entitled ?"

The names of the twelve workers were then listed.

The Tribunal gave its award on 17th December, 1956 and it was duly published by the Government in the Gazette.

In paragraph 9 of its award the Tribunal recorded :

"But the contention of the workers is that the retrenchment and reorganisation itself is not *bona fide*. Though the claim statement contains allegations of victimization and unfair labour practice Mr. Viswanathan at the time of his arguments definitely gave up those contentions. His main argument is that this reorganisation and retrenchment is an attempt to retain or restore the excessive profits which the company had been deriving prior to the fixation of reduced prices for the tyres and tubes by the Government of India".

Dealing with this contention the Tribunal observed in paragraph 14 of its award :

"I am inclined to agree with the view of Mr. Viswanathan. If the retrenchment had been effected to avoid losses or to secure reasonable profits then something can be said in favour of the company. But in this case it is otherwise and the retrenchment is clearly prompted by a desire to secure profits lost by the price fixation. It is only an attempt to set at naught the object of the Government, namely, that the company should get lesser profits."

After referring to a decision of the Labour Appellate Tribunal, that 6 per cent. on paid-up capital and 4 per cent. on the working capital constituted reasonable returns to a company, the Tribunal recorded in paragraph 15 of its award :

"Under such circumstances on considerations of social justice it must be held that the retrenchment of these twelve workers was not justified."

Dealing next with the contention of the Union that, even if the retrenchment had been justified, the retrenchment of the twelve employees in question was not effected in accordance with law, and that it offended the statutory principle of last to come and first to go, the Tribunal recorded in paragraph 26 of its award :

"The evidence of M.W. 1 is, in my opinion, sufficient to prove the case of the workers that all these sub-depots which are controlled by the Madras office are really parts of the Madras branch and that all of them should be treated as one unit along with the Madras office. It therefore follows that the principle of pooled seniority should have been followed by the Management in picking out the workers for retrenchment even if there was justification for retrenching m n. As this principle was not adopted, the retrenchment of these men cannot be upheld".

The Tribunal, however, held that, even with reference to the Madras office alone, the retention of Thirumalai in preference to three of his seniors in the category of clerks vitiated the retrenchment of these three workers.

The Tribunal ordered the reinstatement of the twelve employees whom the petitioner had purported to retrench.

The petitioner applied under Article 226 of the Constitution for the issue of a writ of *certiorari* to set aside the award of the Tribunal, dated 17th December, 1956.

Before dealing with the question whether the award of the Industiral Tribunal based on the finding, that the retrenchment was unjustified, is liable to be set aside by the issue of a writ of *certiorari*, I shall dispose of the contention of the petitioner, that considerations of pooled seniority vitiated the finding of the Tribunal that the retrenchment ordered by the Management was contrary to law. That question has to be considered on the basis, that what was ordered by the Management was in fact a retrenchment and that it was otherwise lawful.

Mr. Nambiar, the learned counsel for the petitioner, was right when he pointed out, that even in the adjudication of an industrial dispute, the rights and liabilities of the employer and the employees (workmen) in so far as they relate to retrenchment, are governed by the statutory provisions of Chapter V-A of the Industrial Disputes Act. Section 25-J (2) which makes it clear runs :

"For the removal of doubts, it is hereby declared that nothing contained in this Chapter shall be deemed to affect the provisions of any other law for the time being in force in any State in so far as that law provides for the settlement of industrial disputes, but the rights and liabilities of employers and workmen in so far as they relate to lay-off and retrenchment shall be determined in accordance with the provisions of this Chapter".

Section 25-G is the statutory provision, which embodies the principle of last to come and first to go as applicable to the employees to be retrenched. Section 25-G runs :

"*Procedure for retrenchment*—Where any workman in an industrial establishment, who is a citizen of India, is to be retrenched and he belongs to a particular category of workmen in the establishment, in the absence of any agreement between the employer and the workman in this behalf, the employer shall ordinarily retrench the workman who was the last person to be employed in that category, unless for reasons to be recorded the employer retrenches any other workman".

Section 25-G makes it specific that the unit of the industry to which that statutory principle governing retrenchment applies is the industrial establishment. The definition of an industrial establishment in the *Explanation* to section 25-A (2) is limited in its scope and cannot apply to the interpretation of " industrial establishment " as it has been used in section 25-G. For the purposes of applying section 25-G, the position is that the term " industrial establishment " has not been defined by the Act itself.

Though not in relation to section 25-G, I had occasion in *Sri Rama Vilas Service, Ltd.* v. *State of Madras*[1], to consider what constituted an " industrial establishment " within the scope of the Act, for purpose other than those specified in the *Explanation* to section 25-A (2). The expression " industrial establishment " or " establishment " has been used in several other sections as well and, to the extent possible, the same meaning will have to be given to that expression in the absence of any statutory definition. Section 2 (*kk*) refers to branches or other establishments of an insurance company in more than one State. Section 2 (*n*) (*ii*) includes any section of an industrial establishment within the definition of public utility service. Section 3(1) provides for the constitution of Works Committees for industrial establishments. Section 9-B empowers the appropriate Government to exempt any class of industrial establishments from the provisions of the Act. Section 10-(1-A) empowers the Central Government to refer for adjudication by a National Tribunal, if the industrial dispute is of such a nature that industrial establishments situated in more than one State are likely to be interested in or affected by such a dispute. Section 10 (5) also refers to a dispute concerning any establishment or establishments. The prohibition imposed by section 23 is on the workman who is employed in any industrial establishment. The *Explanation* to section 33 (3), which like section 10 (1-A) was enacted by the Amending Act XXXVI of 1956, defines the expression "protected workman" in relation to an establishment. Of course, it is not my endeavour to define what the expression " industrial establishment " means in each of these sections. I am concerned only with the scope of the expression "industrial establishment" as it occurs in section 25-G. I have enumerated the other sections only to understand the scheme of the Act. From the scheme of the Act it should be clear that it envisages, each as a distinct concept (1) an industry; (2) an industrial concern; within an industry; (3) an industrial establishment, which may itself be the whole of the industrial concern, or which may be part of a larger industrial concern; (4) a section of an industrial establishment; and (5) categories of workmen in an industrial establishment or in a section thereof. It should be noted that, while section 25-F refers to a workman employed in an industry, section 25-G refers to workmen in an industrial establishment and further to workman in any specified category in that industrial establishment.

Before deciding whether the retrenchment ordered by the petitioner violated the terms of section 25-G, what the Tribunal had to consider was whether the Madras office, in which the retrenchment was effected, was an industrial establishment within the meaning of section 25-G. The learned counsel for the petitioner was, I think, well founded in his contention, that virtually the Tribunal did not address itself to that question at all. It is true that the Tribunal specifically referred to the terms of section 25-G in paragraph 17 of its award. But that was only to determine whether the retention of Thirumalai and the retrenchment of three others were in contravention of section 25-G. Nowhere in paragraphs 24 to 26 of its award, where the Tribunal dealt with the question at issue, whether the retrenchment of the twelve employees offended the statutory principle of last to come and first to go, did the Tribunal refer to section 25-G. Nor even does it appear

1. A.I.R. 1956 Mad. 115.

to have kept in view that section 25-G emphasises, that it governs retrenchment in an industrial establishment.

It should be obvious that independent of section 25-G there can be no scope for considerations of seniority or " pooled seniority " as the Tribunal called it, in deciding whether the retrenchment ordered by the petitioner was illegal.

For purposes of convenience I shall set out again what the Tribunal recorded in paragraph 26 of its award :

" The evidence of M.W. 1, is, in my opinion, sufficient to prove the case of the workers that all these three sub-depots which are controlled by the Madras office are really parts of the Madras branch and that all of them should be treated as one unit along with the Madras office ".

Even if the Tribunal is to be deemed to have meant by the expression " one unit " an industrial establishment within the meaning of section 25-G, and to have decided that the Madras office with its three sub-depots at Ernakulam, Bangalore and Vijayawada constituted a single industrial establishment, such a decision would have been vitiated by the wrong application of section 25-G and would have constituted an error apparent on the face of the award itself.

In *Provat Kumar* v. *W. T. C. Parker*[1], Harries, C.J., observed at page 118 :

" It seems to me quite clear that......the words 'industrial establishment' mean the place at which the workmen are employed and the words as used in section 2 (*n*) (*ii*) must have the same meaning as when they are used in section 23. That being so, it is quite clear that section 23 could not cover a case of workmen in Bombay striking against an employer with whom employees in Calcutta have a dispute ".

I respectfully agree with these observations. I had no occasion to refer to that decision when I decided *Sri Rama Vilas Service, Ltd.* v. *State of Madras*[2]. After pointing out in effect in that case that the Sri Rama Vilas Service, Ltd., was an industrial concern with its head-office at Madras, and that the branch at Kumbakonam was an industrial establishment by itself, I stated at page 122 of the report :

" The industrial establishment as such has not been defined by the Act. But there should be little difficulty in determining the scope of that expression. I need refer only to section 3 of the Act to negative the contention of the learned counsel for the Madras Union, the S.R.V.S., Ltd., with all its branches should be taken as one industrial establishment.

The S.R.V.S., Ltd., is not a concern whose operations are limited to the Madras State alone. It has a branch at Bangalore.. One of the allied concerns, Amalgamations, Ltd., had its branch in Vijayawada in the Andhra State. If the contention of the learned counsel for the Madras Union has to be accepted, the Works Committee contemplated by section 3(1) of the Act should be a Works Committee for the industrial concern of S.R.V.S., Ltd., as a whole, wherever its branches may be situated, either within this State or without the State. Such a construction I am unable to place on section 3 (1) of the Act.

It certainly provides for a separate Works Committee for each industrial establishment, though that establishment might only be a branch of the industrial concern which has branches not only within this State but outside the State as well. Besides, there is another difficulty in accepting the contention of the learned counsel for the Madras Union. As I said, it is certainly clear that the S.R.V.S., Ltd., with its head office at Madras, had its operations extending outside the Madras State.

If the whole of the S.R.V.S., Ltd., is to be treated as one industrial establishment, and the dispute between the workers of the industrial concern as a whole and the management of that concern has to be treated as an industrial dispute within the meaning of section 2 (*k*), the Madras Government would not be the appropriate Government to refer such a dispute under section 10 (1) (*c*) of the Act."

Similar considerations would apply if the sub-depots of the petitioner's industrial concern at Ernakulam, Bangalore and Vijayawada should be treated as part of the industrial establishment at Madras. It may be of interest to notice the provision made by the Amending Act of 1956, Act XXXVI of 1956, in section 10 (1-A) to which I have already adverted, for the adjudication of disputes, if an industrial concern consists of industrial establishments lying in more than one State.

The petitioner company is an industrial concern, and the office at Madras is an industrial establishment of that industrial concern. Each of the sub-depots

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1. A.I.R. 1950 Cal. 116.
2. A.I.R. 1956 Mad. 115.

in the different States is a separate industrial establishment of that same industrial concern for purposes of section 25-G.

I have so far proceeded on the basis that it was a retrenchment in fact that the petitioner company ordered. If that was so, the Tribunal was clearly in error when it held that the retrenchment was illegal. I have pointed out that the retrenchment did not contravene section 25-G and was not illegal.

I shall next deal with the question, whether what was ordered by the petitioner company was in fact a retrenchment and was a lawful retrenchment. The industrial dispute that was referred for adjudication was " whether the retrenchment of the twelve workmen was justified." What the Tribunal had to decide in the first instance was whether it was in fact a retrenchment, or whether it was a case of a colourable exercise of the power, based on the right of an employer to effect retrenchment, in which case it would not have been a retrechment at all. If, for instance, under the guise of ordering retrenchment the employer in fact victimised selected employees, or if what the employer did amounted to an unfair labour practice, it would not have been really a case of retrenchment. It should be remembered that such allegations were made by the Union, but they were abandoned. Similarly, if what was ordered by the petitioner was *mala fide*, it would again be a case of a colourable exercise of power, and it would be no retrenchment at all.

The Tribunal did not negative the claim of the petitioner, that after the reorganisation that had been effected resulting in a reduced workload in the Madras office there was enough work only for twenty-one out of thirty-three that had hitherto been employed. That was certainly a very relevant factor in deciding whether the retrenchment was ordered in good faith. The Tribunal was right when it recorded in paragraph 13 of its award :

"........the important question that arises for consideration is whether this retrenchment was done in good faith ".

The Tribunal did not, however, in express terms find that the retrenchment was not ordered in good faith. But apparently the Tribunal was of that view. The only ground on which the Tribunal rested its decision, that the retrenchment was unjustified, was its concept of social justice, by which it apparently meant, in this case, that if an employer wanted to get a return of more than 6 per cent. on his paid-up capital or more 4 per cent. on his working capital, a retrenchment justified, for example, on the quantum of work available, would be one vitiated by bad faith. I have no hesitation in accepting the contention of Mr. Nambiar, that such a concept of social justice is an entirely irrelevant factor in deciding whether a retrenchment was ordered in good faith, or wheher it only amounted to a clourable exercise of the power to retrench. Any retrenchment ordered would, of course, be subject to the statutory provisions in Chapter V-A of the Act.

Mr. Nambiar urged that any consideration of social justice would be irrelevant, in deciding whether a given act amounted to a retrenchment or not as defined by section 2 (*oo*) of the Act. The portion of section 2 (*oo*) which is relevant for the present purposes runs :

" Retrenchment means the termination by the employer of the service of a workman for any reason whatsoever otherwise than as punishment inflicted by way of disciplinary action........"

Apparently wide though the ambit is made by the use of the expression "any reason" that certainly does not rule out the investigation of an allegation, that the retrenchment in question was *mala fide*. What constitutes good faith or the absence thereof is, of course, a different problem.

In *J. K. Iron and Steel Co.* v. *Iron and Steel Mazdoor Union*[1] : Bose, J., observed, at page 277 :

" The only question referred was, was the retrenchment justified? And we find it impossible to see how that can be determined without considering the question of good faith which in turn would largely depend on the finances of the company, on the adverse effect that retention would have on

1. (1956) S.C.J 270.

the business and on whether retention would mean the dead-weight of an uneconomic surplus and so forth".

That observation, in my opinion, does not justify the contention, that good faith attendant on a retrenchment could be established only if the employer was losing or was making no profits, or even a contention, that retrenchment would be at least *prima facie*, *mala fide*, if it was ordered when the employer was already getting a return of more than 6 per cent on his paid-up capital or of more than 4 per cent. on his working capital. The dead-weight of an uneconomic surplus, to which Bose, J., referred can operate at any level of profits. There is nothing unlawful in an employer desiring to make even more profits by getting rid of the dead-weight of an uneconomic surplusage.

The learned counsel for the respondent referred to *Thakur* v. *Ruston & Hornsby, Ltd*[1]. But the test posed there can have no application to the facts of this case.

Mr. Nambiar relied on the observations of Bhagwati, J., in *Mudr Mills Co.* v. *Suti Mills Mazdoor Union* [2].

"The considerations of social justice imported by the Labour Appellate Tribunal in arriving at the decision in favour of the respondent were not only irrelevant but untenable. Social justice is a very vague and indeterminate expression and no clear-cut definition can be laid down which will cover all the situations. Mr. Isaacs, the learned counsel for the respondent, attempted to give a definition in the following terms :

'social justice connotes the balance of adjustments of the various interests concerned in the social and economic structure of the State, in order to promote harmony upon an ethical and economic basis' and he stated that there were there parties concerned here, *viz.*, the employers, the labour and the State itself and the conception of social justice had to be worked out in this context. Without embarking upon a discussion as to the exact connotation of the expression 'social justice' we may only observe that the concept of social justice does not emanate from the fanciful notions of any particular adjudicator but must be founded on more solid foundations."

The question at issue there was, whether the workmen were entitled to any bonus when the company had no trading profits that year.

I am not called upon to decide whether considerations of social justice will be wholly irrelevant in the adjudication of an industrial dispute. It may be of interest to note that in section 17-A (*b*) of the Act the appropriate Government is given the right to rest its decision not to make an award enforceable on grounds of national economy or social justice. That, of course, does not apply to the adjudication of an industrial dispute by an Industrial Tribunal. The question before me is not whether considerations of social justice would be irrelevant even for deciding whether a retrenchment was ordered *mala fide* or in good faith. The limited question before me which alone I need decide in this case, is whether the concept of social justice expounded by the Industrial Tribunal in its award was a relevant factor in deciding whether the petitioner acted *mala fide* in ordering the retrenchment of the twelve employees in the office at Madras. That question, as I have already pointed out, I have no hesitation in answering in the negative.

In my opinion, the Tribunal was in error when it imported an irrelevant consideration in deciding whether the retrenchment was justified. It was in error again when it failed to keep the requirements of section 25-G in view in deciding that the retrenchment ordered by the petitioner company was lawful. These should suffice to set aside the award of the Tribunal, subject to what I have to record about the retention of Thirumalai.

The question that remains for consideration is whether the decision of the Tribunal, that the retention of Thirumalai contravened the provisions of section 25-G is vitiated by any error apparent on the face of the record. Whether Thirumalai was included in the category of clerks in the Madras office was a question of fact, which the Tribunal had jurisdiction to decide. I am unable to hold that there

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1. (1956) 1 L.L.J. 14.
2. (1955) 1 M.L.J. (S.C.) 127 : (1955) An. W.R. (S.C.) 127 : (1955) S.C.J. 214 : (1955) 1 S.C.R. 991, (S.C.).

was no material on which the Tribunal could find that, though Thirumalai was designated a Store Assistant on the date of the retrenchment, he was really in the category of clerks. The quantum of evidence or its sufficiency on which that finding was rested may not be a matter for investigation at this stage. I see no justification for interfering with that part of the award of the Tribunal.

Subject to what I have stated above, the petition will stand allowed and the rule will be made absolute. No order as to costs.

V.S. —— *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. P. RAJAGOPALAN, *Officiating Chief Justice* AND MR. JUSTICE RAJAGOPALA AYYANGAR.

G. Narayanaswami Naidu .. *Appellant**

v.

C. Krishnamurthi and another .. *Respondents.*

Constitution of India (1950), *Article* 191 (1) (*a*) *and* (*e*)—*Representation of the People Act* (*XLVIII of* 1951)—*Office of profit—What amounts to—Employee of Life Insurance Corporation of India—If holds an office of profit under the Government of India—Regulation of the Corporation prohibiting its employees from standing for election—If amounts to a law disqualifying the candidate within the meaning of Article* 191 (1) (*e*) *of the Constitution.*

In order to decide whether a public corporation like the Life Insurance Corporation of India is a department of the Government, the incorporation of the body, the degree of control exercised by the Government, the degree of dependence of the Corporation on the Government for its financial needs and the functional aspects of the Corporation have all to be considered. Having regard to the object and the scope of the legislation which set up the Life Insurance Corporation of India, the Corporation cannot be considered to be a department or servant or agent of the Government. Service under the Insurance Corporation is not service under the Government of the Union within Article 191 (1) (*a*) of the Constitution.

The expression 'office of profit' in Article 191 (1) (*a*) of the Constitution cannot be construed in a wide sense so to include service in such statutory corporations which have some relation within the Government. Hence an employee of the Life Insurance Corporation is not disqualified from standing for election to the State Assembly under Article 191 (1) (*a*) of the Constitution.

Regulation 29 of the Regulations made by the Life Insurance Corporation under the powers vested in it by section 49 (1)(*b*) of the Life Insurance Act, 1956, is a law made under an Act of Parliament within the meaning of Article 191 (1) (*e*) of the Constitution of India. As that regulation prohibits an employee of the Corporation from standing for election as a member of a legislative body, such employee will be disqualified under Article 191 (1) (*e*) from contesting an election.

(Historical aspects of the development of public corporations traced—Nature and functions of such corporations explained—Relationship with Government and scope and extent of Government control examined—Case-law English and Indian discussed).

Appeal against the Order of the Court of the Election Tribunal, Nagapattinam, dated 5th August, 1957 and made in Election Petition No. 178 of 1957.

The Advocate-General (*V. K. Tiruvenkatachari*), *V. V. Raghavan* and *G. Rajan,* for Appellant.

A. Ramachandran for *Messrs. Row and Reddi, S. Viswanathan* and *B. R. Dolia,* for Respondents.

The Judgment of the Court was delivered by

Rajagopala Ayyangar, J.—The Civil Miscellaneous Appeal has been preferred to this Court under section 116-A of the Representation of the People Act from the order of the Election Tribunal, Nagapattinam, in Election Petition No. 178 of 1957 before it.

The election in question was to the Mayuram constituency of the Madras State Assembly, and two members—one to the general seat and one reserved for a member of the scheduled caste—had to be elected. The election was held on 11th March,

* A.A.O. No. 209 of 1957. 23rd Januray, 1958.

1957. At this election, G. Narayanaswami Naidu and P. Jayaraj who were the respondents in the election petition were respectively elected to the general and reserved seats. The question at issue in the petition related to the propriety of the rejection of the nomination of C. Krishnamurthi, the election petitioner. First February, 1957, was the date fixed for the scrutiny of the nominations. On that date one of the candidates K. Krishnamurthi—not a party to these proceedings—objected to the nomination of the petitioner C. Krishnamurthi on the ground that the latter held "an office of profit under the Government of India" in that he was a salaried employee—a Junior Inspector under—the Life Insurance Corporation of India, and was therefore disqualified to stand for election under Article 191 (1) of the Constitution. The Article runs:

"191 (1).—A person shall be disqualified for being chosen as, and for being, a member of the Legislative Assembly or Legislative Council of a State—

(a) if he holds any office of profit under the Government of India or the Government of any State specified in the First Schedule, other than an office declared by the Legislature of the State by law not to disqualify its holder ;

....

(e) if he is so diqualified by or under any law made by Parliament."

This objection was upheld and the Returning Officer rejected the nomination of the petitioner. As stated earlier, the other candidates went to the poll and Narayanaswami Naidu and Jayaraj were declared duly elected. C. Krishnamurthi filed the election petition for declaring the election of Narayanaswami Naidu and Jayaraj to be void on the ground that his own nomination had been improperly rejected. Section 100 (1) of the Representation of the People Act enacts :

"(1) Subject to the provisions of sub-section (2) if the Tribunal is of opinion.

....

(c) that any nomination has been improperly rejected....
shall declare the election of the returned candidate to be void."

If therefore C. Krishnamurthi was able to establish that the rejection of his nomination was improper, the Tribunal had to set aside the election. This petition was referred to the District and Sessions Judge of East Tanjore who was appointed as the Election Tribunal.

Before the learned Judge two points were urged : (1) that C. Krishnamurthi was not disqualified to stand because the "office of profit" that he held was not under the Government of India but under the Life Insurance Corporation—a statutory Corporation created by the Life Insurance Corporation Act (XXXI of 1956). The Tribunal upheld this contention holding that the office of profit which C. Krisnamurthi held did not fall within Article 191 (1) (a) of the Constitution. (2) The other point that was considered by the Tribunal related to C. Krishnamurthi being disqualified under Article 191 (1) (e). Under Regulations framed by the Corporation by virtue of the powers vested in that behalf by the Life Insurance Corporation Act, 1956, the employees of the Corporation were prohibited from standing for election to the Legislatures, Union and State. It was urged before the Tribunal that these regulations, which bound Krishnamurthi, were a disqualification "*under* any law made by Parliament" within Article 191 (1) (e). The Tribunal negatived this contention also. This resulted in the Tribunal holding that C. Krishnamurthi was under no disqualification to stand for election, and that his nomination was improperly rejected by the Returning Officer. On this finding the Tribunal declared the election of Narayanaswami Naidu and Jayaraj to be void. It is the correctness of this order that is canvassed by Narayanaswami Naidu, the candidate returned to the general seat, impleading Jayaraj as respondent in this appeal.

The questions raised in the appeal, therefore, turn upon (1) whether an employee of the Life Insurance Corporation of India holds an office of profit under the Government of India and (2) whether the Regulations made by the Life Insurance Corporation constitute a law which disqualifies its employees from standing for election within Article 191 (1) (e).

The words in Article 19 (1) (*a*) "if he *holds any office of profit under* the Government of India or the Government of any State" trace their origin to the words "office of profit under the Crown" used in sections 24 and 25 of the Succession to the Crown" Act, 1707, of the United Kingdom. But there are no decisions of the English Courts interpreting the expression. The meaning of these words was the subject of critical examination by a Select Committee appointed by the House of Commons which submitted its report in October, 1941. Dealing with the phrase "office or place of profit under the Crown" this Select Committee stated :

> "There is no comprehensive statement of the law on this subject which can be regarded as authoritative. The standard constitutional works of reference are mainly concerned with the statutory portion of the law, which of itself is too voluminous to be treated by any one of them exhaustively. But there is another portion consisting of ancient resolutions of the House of Commons which, though mostly reinforced or superseded by later legislation, still determine the law in some particulars. Another part of the law is composed of judicial or quasi-judicial decisions of the House on individual cases. Thus the law, as a whole, is composite in character, part statute and part practice ; it cannot be studied in compilations, but has to be sought for in the original sources—the statute book, the Commons' Journals and the reports of Select Committees."

We have, therefore, no guidance from any direct decisions of the English Courts explaining the import of the relevant phrase.

The Advocate-General who appeared for the appellant submitted an able and learned argument on what constituted "an office of profit under the Government" within Article 191 (1) (*a*).

Before, however, referring to the points urged by him it would be convenient to set out the basis on which the Tribunal rested its decision against the appellant. We do so because, it was the same line of argument that was put forward before us by learned counsel for the respondent. That the "office" of the Junior Inspector was an "office", and that such office was an "office of profit" were not disputed either before the Tribunal or before us. The entire controversy was confined to the question whether that "office" was held *under* the Government of India.

The Tribunal formulated the following tests for determining whether the office was held under the Government. (1) The source of the fund from which the employee was remunerated : and (2) the authority in whom the power to appoint to the office and of removal therefrom, was vested. The Tribunal analysed the provisions of the Life Insurance Corporation Act and the rules and regulations made thereunder and recorded these findings. (1) The officer was paid out of the funds belonging to the Corporation which was a legal entity separate from the Government. (2) The power of appointment and removal of officials including that of the Junior Inspector was vested in the Corporation. It wound up with this statement :

> "That the Corporation apart from the Government is a legal entity with a perpetual succession and common seal and, therefore, the contention that, because the Government of India has provided capital for the Corporation and has large powers of supervision and control over its management, the petitioner must be deemed to be an employee or a person holding an office of profit under the Government of India appears to be untenable."

In reaching this conclusion the Tribunal followed the decision of the Allahabad High Court in *Madan Mohan Lal* v. *Om Prakash*[1], in which it was held that an employee of the Life Insurance Corporation was not "an employee of the Central Government" for the purposes of the United Provinces Municipalities Act, which carried a disqualification worded similar to Article 191 (1) (*a*) of the Constitution. The learned Advocate-General submitted that the reasoning of the Court below failed to notice recent trends in Government administration, particularly, in the case of post-war modern welfare states, and that it attached too much importance to form ignoring the substance. It would be convenient to refer even at this stage to the decision of the Supreme Court in *Maulana Abdul Shukoor* v. *Rikhab Chand*[2] (not yet reported but the text of which judgment was made available to us by the Advocate-General) in which almost the same line of approach as that of the Tribunal in this

1. A.I.R. 1957 All. 384.
2. Since reported in (1958) S.C.J. 329 : (1958) 1 M.L.J. (S.C.) 88 : (1958) 1 An.W.R (S.C.) 88.

case was adopted. The question that arose was as regards the election of the appellant Maulana Abdul Shukoor to the Council of States by the Electoral College of Ajmer. The appellant was declared elected and an unsuccessful candidate filed an election petition. The grounds upon which the election was challenged included *inter alia*, one that the appellant was holding "an office of profit under the Union Government." The office which he held and which, it was stated, brought him within the qualification enacted by the Article 192 (1) (*a*) of the Constitution, which is in terms identical with Article 191 (1) (*a*), was as manager of a school administered by the Administrator of the Durgah Khwaja Sahib, appointed under the provisions of the Central Act XXXVI of 1955. The Election Tribunal upheld the objection of the Election Petitioner and held that the appellant was disqualified under Article 102 (1) (*a*) as holding " an office of profit under the Government of India". The Supreme Court allowed the appeal from this decision and the reasons assigned for this reversal were :

Under the Durgah Khwaja Sahib Act (Act XXXVI of 1955) the committees which employed the appellant was a body corporate with perpetual succession and a common seal having the right to sue and be sued in the name of the President of the Committee. The contention urged on behalf of the respondents was that under the Act of 1955 the Committee of management though incorporated was appointed by the Central Government, who also retained the power to remove from office any member of the Committee, and that consequently a person employed by the Committee was under the control and supervision of the Central Government and therefore held an office of profit under the Government of India and this was rejected. Kapur, J., who delivered the judgment of the Court, pointed out that the Constitution itself drew a distinction between the holding of an office of profit under the Government and under any local or other authority subject to the control of either of the said Governments. This latter type of employment also constituted a disqualification, for the officers of the President and Vice-President under Articles 58 (2) and 66 (4) of the Constitution, where the words "under any local or other authority subject to the control of any of the said Governments" were used—words which were not to be found under Article 102. Dealing with the submission, that the fact that the Committee or members of the Committee were removable by the Government of India, who could make bye-laws prescribing the duties and powers of its employees, rendered the employees of the Committee, holders of offices under the Government of India, his Lordship said :

" The appellant is neither appointed by the Government of India nor is removable by the Government of India nor is he paid out of revenues of India. The power of the Government to appoint a person to an office of profit or to continue him in that office or revoke his appointment at their discretion and payment from out of Government revenues are important factors in determining whether that person is holding an office of profit under the Government, though payment from a source other than Government revenue is not always a decisive factor. But the appointment of the appellant does not come within this test. The test of the power of dismissal by the Government or by an officer to whom such power has been delegated which was pressed in support of his case by the respondent is equally inapplicable to the facts of the present case because the appellant cannot be dismissed by the Government or by a person so authorised by the Government. He is a servant of a statutory body which in the matter of its servants acts within the powers conferred upon it by the statute......the appellant has not been employed by a servant of the Government who is authorised to employ servants for doing some service for the Government nor is he paid out of Indian revenues."

The points therefore stressed by his Lordship were two (1) the contrast between the scope of the disqualification enacted by Articles 58 (2) and 66 (4) in the case of the President and Vice-President of India respectively and by Article 102 in the case of members of legislative bodies. Whereas in the former case employment under a local or other authority was also a disqualification, this was not a disqualification in the case of members of the State or Union Legislature. (2) An employee of a legal entity created by statute, where the powers of appointment and dismissal were vested in the such body and whose remuneration came out of the funds of such body could not be treated as holding an office of profit under the Government notwithstanding that the members of the statutory body were

themselves appointed by Government and were liable of to be removed by Government.

The learned Advocate-General submitted that in the case before the Supreme Court the Government had merely assumed control over the property of a public charity and provided for the proper management of this public trust. It was, therefore, not in any sense the exercise of a sovereign power or the creation of a department of State and therefore furnished no analogy to the present case, where the Government had nationalised the business of the insurance by taking over the assets of companies theretofore transacting life insurance business, had by statute created for itself a monopoly in such business and had created a Corporation for the transaction of what was thereby rendered a State activity.

As the question, whether the Life Insurance Corporation is or is not virtually a department of the State or a servant of the Government, would be dependent on the provisions of the statute constituting the Corporation, we shall proceed to analyse them, to determine the precise degree of control and examine whether the amount of control established the identity of the Corporation as part of the Government.

The preamble to the enactment, Act XXXI of 1956, recited :

> "An Act to provide for the nationalisation of life insurance business in India by transferring all such business to a Corporation established for the purpose and to provide for the regulation and control of the business of the Corporation and for matters connected therewith or incidental thereto".

Section 3 provided for the establishment of a corporation called the Life Insurance Corporation of India :

> "a body corporate having perpetual succession and a common seal with power to acquire, hold and dispose of property and which can by its name sue or be sued" ;

and section 4 for the appointment by the Government of India of persons who shall constitute the Corporation and lays down the qualifications or disqualifications of the persons to be appointed as members. The original capital of the Corporation was to be five crores of rupees to be provided by the Central Government after due appropriation made by Parliament by law for the purpose (*vide* section 5). Section 6 was concerned with the functions of the Corporation, and the section laid on the Corporation the duty of co-ordinating the business of life insurance in or outside India, and the Corporation was directed so to exercise its powers as to secure that this business was developed to the best advantage of the community. Section 18 provided for the Central and Zonal officers of the Corporation, the locus of the central office being determined by the Central Government and that of each of the zonal offices by the Corporation itself, with the previous approval of the Central Government. Section 21 is important, in that it set the limits to the powers to be exercised by the Central Government in the policy to be followed by the Corporation. That section enacted :

> "In the discharge of its functions under this Act the Corporation shall be guided by such directions in matters of policy involving public interest as the Central Government may give to it in writing ; and if any question arises whether a direction relates to a matter of policy involving public interest the decision of the Central Government thereon shall be final".

Section 23 enabled the Coporation to employ such number of persons as it thought fit in order that it might properly discharge the functions laid upon it by the Act. A separate fund was constituted for the Corporation by section 24 to which all receipts of the Corporation were to be credited, and payments by the Corporation were to be made therefrom. Section 25 provided for auditors to be appointed by the Corporation with the approval of the Central Government. The Act envisaged that the commercial activities of the Corporation might yield a profit, and section 28 provided for the destination of the profits thus earned. 25 per cent. of the surplus was to be reserved for the policy-holders and the balance to be utilised for such purpose as the Central Government should determine. The reports of the auditors and of the actuaries relating to the activities of the Corporation were directed to be laid before the Parliament under section 29 when such reports

were received by the Central Government. Section 37 contained a guarantee by the Central Government to the policy-holders " that their policies when matured, and subject to the terms of the policies, shall be paid over to the beneficiaries under them." Section 38 enacted that "the Corporation shall not be wound up except under the orders of the Central Government and in such manner as they may direct." Section 47 protected from suit, prosecution or other legal proceeding the members of the employees of the Corporation for anything done in good faith under the Act. Section 48 reserved power to the Central Government to make rules to carry out the purposes of the Act, and in particular the terms of office and the conditions of service of members who found the Corporation, were subject to this rule-making power. Similarly rules made by the Central Government might provide for conditions subject to which the Corporation might appoint employees. The rules so made by the Central Government were directed to be laid before Parliament under section 48 (3). Section 49 was concerned with the grant of power to the Corporation to make regulations not inconsistent with the Act and the rules, with the previous approval of the Central Government, and the subjects which, *inter alia*, these regulations might cover were enumerated in section 49 (2) (*b*), and these included " the method of recruitment of employees and agents of the Corporation and terms and conditions of service of such employees or agents ".

The learned Advocate-General urged that as the carrying on the business of insurance involved commercial operations, the department had to be conducted on business and commercial lines, making the concern subserve the economic needs of the people of the State, and with a policy co-ordinated to the economic purpose and the social objectives which the Government had in view. Parliament created therefore a Corporation for carrying on this business, but notwithstanding that in form a new legal entity was created still it was virtually a department of Government, with the result that the Corporation was the servant of the State and the employees of the Corporation were the employees of the State. It was in this context that he relied on the provisions of section 21, which enabled the Central Government to give directions laying down the lines of policy to be followed by the Corporation. He also drew our attention to the terms of section 48, which vested in Government power to make rules to carry out the purposes of the Act. He further pointed out that the formation of Corporation of this sort was a development of modern times to enable Government to run their commercial activities on business principles.

He also pointed out that incorporation of Government departments was known to the law, and that the mere fact of incorporation was not sufficient to deny or negative the incorporated body being either a department of the Government or a servant of the Government. In regard to the last proposition there could be no dispute, because the experiments in the organisation of departments in England have sometimes taken the form of incorporating the officer at the head, as a corporation sole. But when one passes beyond such cases—of which the office of the Postmaster-General is perhaps the most outstanding example—the problem gets complicated; and its solution has baffled jurists and judges. Varying answers have been given which might appear to be contradictory, though several of the decisions and the passages in the writings of the jurists might be explained by reference to the particular approach to the question or the particular consequence flowing from the general theory, with which they were immediately concerned. We consider it, however, unnecessary to trace the historical phases through which this question has passed or to set out chronologically the decisions rendered on the broad aspects of the problem.

The following quotation from Griffith and Street[1] sets out the problems involved for consideration in clear perspective.

" The rules for defining at common law ' a servant of the Crown ' are even now lacking in precision. The Courts, when called on to decide whether any public bodies set up by statute in the last

1. Principles of Administrative Law, pp. 247, 248 and 299.

hundred years are agents of the Crown have found the statutes themselves singularly unhelpful, and have refused to lay down definite criteria. The Court of Appeal has decided in *Tomlin* v. *Hannaford*[1], (to which we shall refer in due course) that the Transport Commission is not the agent of the Crown, and, therefore it may be assumed that none of the nationalised industries is an agent of the Crown. It is still uncertain whether the social service corporations such as the National Hospital Boards, the Central Land Board and the New Towns Development Corporations are Crown agents. It may be said that there are several criteria which from time to time the Judges have thought relevant. These include : Is the body performing tasks formerly carried on by private enterprise ? (*Mersey Docks and Harbour Board Trustees* v. *Gibbs*[2]). To what extent is it subject to ministerial control, for example, has it independent discretionary powers (*Metropolitan Meat Industry Board* v. *Sheedy*[3], *Per* Viscount Haldane). Must it consult a Minister before it acts, can a Minister give it directions ? Is its function one which has historically been regarded as governmental ? *Lane* v. *Cotton*[4], Is it incorporated ? Is it subject to Government audit ? Is its authority general or local ? *Dunbar* v. *Guardians of Ards Union*[5]. Is it a mere domestic body ? (*Powell* v. *Pratt*)[6]. Is execution against its property allowed ? Although *Tomlin* v. *Hannaford*[1], does not lend particular support to the view it is submitted that the degree of control exercised by the Government over the body ought to be the determining fact.

If a corporation is a servant of the Crown, then its sergeants are also servants of the Crown to whom the Crown Proceedings Act will apply. The rule that one servant of the Crown is not liable for the torts of another will normally prevent an alternative action against the corporation from being brought. Lord Atkin has said that incorporated department can be sued for torts committed by themselves (*Mackenzie Kennedy* v. *Air Council*[7]), when the liability is not vicarious.

Dr. Glanville Williams has suggested that none of the new public corporations should be regarded as a Crown servant and that the division of the Corporations into industrial and commercial on the one hand and 'social service' corportations on the other is not a valuable distinction for this purpose. It is, however, clear that functionally the National Coal Board for example, is less controlled by the Government than the Air Licensing Council and that the corporations do fall into separate groups. The following propositions can be advanced.

First, the National Coal Board, the British Electricity Authority, the British Transport Commission and its Executives and the Air Corporations are not so dependent on the Crown as to have the status of Crown servants. All these corporations have considerable statutory powers ; they administer large and self-contained undertakings ; they have considerable financial responsibility and are, with the exception of the Air Corporations, self-supporting ; the power of the appropriate Minister to give general directions is only exercisable when the national interest is involved. The British Transport Commission has been held not to be a Crown servant or agent. Secondly, the Central Land Board and Air Licensing Councilmay be contrasted with these bodies. These two corporations are, it is suggested, Crown servants. They perform functions which are part of a larger scheme for which a Minister is responsible and their powers are limited. Financially they are utterly dependant on the Ministers and on Parliament. The ministerial power to issue general directions is not restricted to matters affecting the national interest. In *Tomlin* v. *Hannaford*[1], Denning, L.J., clearly thought that the Central Land Board exercising its functions 'on behalf of the Minister' was a Crown servant and in *Earl Fitzwilliams Wentworth Estates Co.* v. *Minister of Town and Country Planning*[8], Birkett, J., said that it might 'from most points of view' be regarded as a new Government department. Thirdly Regional Health Boards seem to have been created Crown servants. These bodies also act on behalf of the Minister, performing functions primarily entrusted to him. Financially they are dependent and much controversy has followed some economies which the Minister has required; their functions are part of the national health service for which the Minister is undoubtedly responsible. The power of the Minister to control by regulations and discretions is unlimitted ".

It would thus be seen that though public corporations have had a long, and we might add a distinguished, history, as autonomous organs of Government, particularly for carrying on local administration or for the solution of regional problems, still their use for the purpose of carrying on commercial undertakings or industrial concern is a modern and indeed a post-war development. Sir Arthur Street said of them[9] :

"Like flowers in spring, they have grown as variously and profusely and with as little regard for conventional patterns. They are even less susceptible of orderly classification: with qausi-Government bodies, a new species often suggests a new genus ".

It was Professor Friedman who said :

"The Public Corporation is emerging as the chosen legal instrument of the Labour Government for the public control of basic industries in an economy still based on private enterprise."

1. L.R. (1950) 1 K.B. 18.
2. (1866) L.R. 1 H.L. 93 at 107.
3. L.R. (1927) A.C. 899 at 905.
4. (1701) 1 Raymond 646.
5. (1897) 2 Ir. Rep. 76.
6. L.R. (1936) 2 K.B. 226.
7. L.R. (1927) 2 K.B. 517.
8. L.R. (1951) 1 K.B. 203 at 211.
9. "British Government Since 1918."

Commenting on this Professor Wade observes[1]:

"The Public Corporation, as an agency distinct from the usual form of government department over which a political Minister presides, has evolved in its modern guise from the need for resolving two conflicting considerations:

(a) The demand for some form of State intervention. (b) The resistance to a form of nationalisation which would involve direct administration by the Civil Service.

Hence the constitutions of these State agencies have been influenced by the desire to safeguard some of the features of private enterprise and to avoid the closer control necessarily involved in direct administration by the State. The former is to be seen by the acceptance of the principle that each public utility corporation (as distinct from the regulatory organs or bodies like the National Assistance Board and War Damage Commission) should conduct its affairs on the basis of paying its way; the latter in the autonomy which each is granted to run the day-to-day administration of its business by a staff which is not in the service of the Crown nor appointed by the machinery of the Civil Service Commission—a staff whose higher ranks are unaccustomed to working under a Minister........

There is a practical limit to the size of any undertaking; if efficiency is not to be sacrificed to elaboration of structure, an excessive number of tasks cannot be placed on the shoulders of a single Minister and his department........With one exception, the Central Land Board, they are not Crown Corporations. Their legal liabilities do not differ from those of any other corporate bodies save that for some unexplained reason three or four of them enjoy modified exemption from the Limitation Act, 1939. They have not even the protection of the Public Authorities Protection Act as amended by the last-named enactment. It is true, however, that some of their principal statutory duties are expressed in terms so general that they cannot be enforced by any known legal machinery; though expressed as legal duties they are really no more than declarations ofwhat is the task allotted.

It must be noted that there are broadly two types of public corporations. Of the social service type I shall say nothing because where public corporations are the executive agents they are under the direct control of the Minister. This is not, of course, the case with the industrial and commercial corporations such as the National Coal Board, the Transport Commission with its five executives, the British Electricity Authority, the Gas Council or the proposed Iron and Steel Corporation. The Minister decides the members of the Commission from the type of men likely to inspire the confidence of the rank and file engaged in the concern. The Minister is empowered in each case after consultation with the corporation, to give directions of a general character as to the exercise and performance of the functions of the corporation in relation to matters which appear to him to affect the national interest. In some cases he can order a discontinuance of part of its activities. Reorganisation and schemes involving substantial outlay require his approval........It is the Minister who will have the answer in Parliament in any debate which may arise out of the annual reports which each corporation must render. It is the Minister who can veto the disclosure in these reports of the directions which he may have given to the corporation."

Dealing with the exact constitutional position of the Public Corporations created for carrying on nationalised undertaking Professor Scammell says[2]:

"The exact constitutional position of the national Corporations in charge of the nationalised undertakings has not yet been fully settled. This question is likely to be of some practical importance in connection with the extent to which judicial control can be exercised. It has been suggested that they fall somewhere between government departments and local authorities. On the one hand *Tamlin* v. *Hannaford*[3], decided that they do not rank as government department; whilst, on the other hand, they are more closely linked with the Government through their parent Minister than are local authorities whose members are elected and who are not subject to receive general directions from a Minister. It is, at any rate, now clear, that being neither servants nor agents of the Crown and their functions not being such as fall within the province of Government, they do not share in the privilege and immunities of the Crown. They are, however, public authorities, and in addition, many of them are given special statutory privileges. Three such privileges are common to a number of national corporations: (1) In the case of some corporations a three-year period of limitation applies. (2) Powers of compulsory acquisition of land are conferred upon certain of these bodies. (3) Transitory power to disclaim certain contracts and leases is conferred upon some of these bodies."

Pausing here, we might summarise the position and analyse the tests for determining the constitutional position of Public Corporation as either a department of Government or as a servant of the State. If the statute in terms answered the question, as it did in the case of the Central Land Board under the County and Town Planning Act, 1947, the need for any further enquiry is obviated. But in the absence of such statutory declaration or provision, the intention of Parliament has to be gathered from the provisions of the statute constituting the Corporation. These provisions have to be judged in the light of the following:

1. "The Constitutional spect of the Public Corporation": Article contributed to *Current Legal Problems*, 1949.

2. "Nationalisation in Legal Perspective" in "*The Current Legal Problems*, 1952".

3. L.R. (1950) 1 K.B. 18.

First the incorporation of the body though not determinative is of some significance, as an indication by Parliament of its intention to create a legal entity with a personality of its own, distinct from the State, secondly, the degree of control exercised by the Minister over the functioning of the Corporation is a very relevant factor, a complete dependance on him marking it as really a governmental body, while comparative freedom to pursue its administration being treated as an element negativing an intention to constitute it a Government-agent, this semi-autonomy deriving from the desire to avoid plenary Parliamentary control over the details of its normal administration. Third is the degree of dependence of the Corporation on the Government for its financial needs. Lastly we consider the functional or the historical aspect—some of the decisions laying stress on whether the function discharged by the Corporation could really be treated historically as a pure governmental function—one which pertained to sovereignty or whether it was the administration of a matter merely of local or regional concern.

We shall first dispose of the last of the matters we have set out above. There are obvious limitations to the use of history as providing a test for determining what is a sovereign or governmental function. In the first place any rigid adherence to history would be to ignore the basic changes in the concept of Government which the present century particularly the post-war period has witnessed. Even during the nineteenth century, the idea that the function of the State was merely the maintenance of order and justice within its boundaries gave way to what were designate as its secondary functions—the undertaking of activities which are part of social service, the provision to its citizens of encomic security and well-being. Though at one time these beneficent activities were treated as though they were unessential functions of the State, in recent times these have overshadowed what might be termed the purely police function of the State, with the result that the State is now emerging as the potent instrument of national welfare, a transformation from a police to a welfare state. In these circumstances it would be unrealistic and even misleading to proceed by history and say that, if it was not a part of governmental function at an earlier date, the activity now pursued should be denied the status which would have attached to it otherwise. We, therefore, consider the submission of the learned Advocate-General that much emphasis should not be laid on history is well-founded.

But on the other hand, the test of function on which he laid considerable emphasis appears to be equally unsafe for identifying a public corporation as a part of the mechanism of the State. To start with, it may be mentioned, that for this purpose, corporations created for Municipal or Local Administrations are not treated as part of the State so as to render the corporators or those employed by the Corporation either as part of Government or as Government servants. Notwithstanding that if " function " were the sole test, no sensible distinction can be drawn between an activity confined to an area or to a locality and that which extends to the entire territory of the State. Here again there is substance in the learned Advocate-General's argument, that this is traceable to historical reasons and should not therefore be treated as detracting from the soundness of his general argument. As Professor Jenks puts it[1]:

"........the great outlines of local government in England were drawn ages before Central Government (as we understand it) came into existence. Central administration as distinct from mere political overlordship, dates from the twelfth century, and is the work of French officials. Local administration is at least five-hundred years older and was probably the unconscious adaptation of primeval Teutonic custom to the conditions of new settlement. But Township and Hundred and Shire carry it back to the days before Alfred, to the dim beginnings of our story, and it was, in fact, only by an integration or union of these smaller groups that England became a nation at all. Consequently, Central Government, when it came, had to reckon with local government as an established fact, and has had to do so ever since."

But the functional classification, pure and simple, shows checks when applied universally. The Ministry of Health or the Ministry of Education are undoubtedly departments of Government, and they deal with social services rendered to the community. But if:

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1. " English Local Government ".

"education be a social service when supplied by public authority is it an economic service when provided by private persons on the basis of fees and profits and similarly with medical services."[1]

Besides, functional classification itself has its roots in history and historical evolution has not been the same in England and in India. The growth and development of municipal and local administration, and their history have run on different lines in the two countries, though in this case, the impact of the English conception has tended to induce an almost identical approach to the legal problems involved.'

Discarding history and the type of service rendered as determining factors Professor Greaves makes this interesting and valuable analysis[2]

"Its (of Public Corporations) claim to peculiar treatment derives rather from the intermediate position between independence and complete answerability through a Minister to Parliament. If it be a species of its own it owed this fact to the attempt, which it embodies but by no means always achieves, to combine freedom in day-to-day operation with subordination in general policy, insulation from detailed public inquiry with ultimate responsibility to the public and financial autonomy, so far as the Treasury is concerned, with regulation of its financial framework by statutory provision or ministerial order.

Its personnel and staff are not part of the civil service, but they are in fact public employees, and the pay and appointment of some are determined by outside authority. And since the experiment of removing a specialised service from full Parliamentary control is not so new as has been claimed and has in the past proved both short-lived and unsuccessful it is important to consider whether any new conditions have arisen to make the lessons of the past lose any of their validity.

The forces motivating this type of administrative experiment are curiously opposite, as are the reasons—largely of mutal suspicion—which engendered it. It has been promoted both by business interests suspicious of state departments and by labour anxious to end competitive disorder without producing capitalist monopoly. There is thus embodied in it a compromise between the notion that the hope of personal profit alone ensures efficiency and the belief that efficiency can be secured by full responsibility to the representatives of the public in Parliament on the part of the Controllers of a socially owned service.

In the inter-war period the strongest force was the dislike by businessmen, and, of course, by their spokesman in both Houses of Parliament, of government 'interference' in industry. They were convinced and war-time experience had lent them evidence derived from emergency conditions, which could be construed into conclusions of general application—that the civil servant could not compete in efficiency with the businessman and that a government department was by definition inferior in practical ability if not in public spirit to a commercial firm. A minister, particularly, if he is weak or is faced by embittered opposition, welcomes an excuse for freeing himself from the need to undergo such cross-examinations. It requires a specially strong awareness of the constitutional proprieties to survive the temptation of escape from Parliamentary supervision, and this all the more so when the escape is offered by interests strongly entrenched in Parliament itself."

Almost a similar conclusion is reached by Professor Goodhart who posing the question[1]:

"If, as I believe, this centralisation of responsibility has in the past been the essential feature of the British method of Government, why has it been discarded in the case of recently nationalised industries ?"

Answers it thus[1]:

"Public administration, when compared with private enterprise, is said to be slow, complex, and incapable of rapid adjustment of changing conditions. The existence of "red-tape" is sometimes blamed on the 'bureaucratic mind' which is said to be over-cautious and unwilling to accept responsibility. . . . . . The second objection to direct governmental administration of an industry is that it places an undue burden on the Minister and on his senior officials. As he is responsible to Parliament for everything, that is done by his ministry, it follows that each new activity must add to his work. He must decide all questions of major policy and he must also see that the executive machinery is running smoothly. He cannot share this responsibility with anyone else for he alone is answerable to Parliament. If too much of the Minister's time is occupied by executive activities, then he will tend to become an administrator rather than a statesman which is his true function.

The third objection to governmental administration is that it is difficult, if not impossible, for a government departmen to decentralize. Such decentralization is never possible in the case of a government department because the Minister, even though he has delegated some of his functions to others, must remain responsible for what they are doing.

1. "Parliament" : A survey by Lord Campion and others.
2. "Civil Service in the Changing State."

The fourth objection to government administration is that it may introduce political considerations in the conduct of undertakings which ought to be administered on non-political lines.

It was the recognition that direct Government management of the nationalised undertakings might lead to red-tape, to placing an undue burden on the Minister, to over-centralization of the industry, and to possible political bias in management which led to the creation of the modern Public Corporations in the hope that they could avoid these handicaps. . . . . . ."

Before we consider the three other matters we have set out earlier, and indeed as facilitating their discussion, it would be convenient if we refer to two decisions, one of the Court of Appeal and the other of Devlin, J., which deal exhaustively with the questions now in debate, Denning, L.J., in *Bank Voor Handel* v. *Slatford*[1], and we make no apology for making somewhat long extracts from these judgments since they contain in addition references to and a discussion of all the important earlier decisions.

The appellant before the Court of Appeal in *Tamlin* v. *Hannaford*[2], was the defendant in an action tried before the County Court at Plymouth. The plaintiff was the lessee of a house which was vested in the British Transport Commission under the Transport Act of 1947. The defendant was the sub-tenant of some rooms in the house. The plaintiff sued for possession of the rooms in the occupation of the defendant, and the defendant claimed the protection of the Rent Restriction Acts. The County Court Judge held that as the title to the house was vested in the British Transport Commission it must be deemed to be owned by the Crown, that the Crown was not bound by the Rent Acts, and he made an order for possession. The question debated before the Court of Appeal was whether by reason of the house becoming vested in the British Transport Commission it had become Crown property, the contrary contention being founded on the British Transport Commission being a distinct legal entity—the Corporation—created for certain public purposes. and that by reason of the vesting of the house in such a body, it could not be treated as Crown property, Denning, L.J., who delivered the Judgment for the Court, after referring to the view of the County Court Judge that the house "must be regarded as owned by the Crown and administered by the Transport Commission as Crown agents being now Crown property, is no longer within the scope of the Rent Acts" said :

"It is, of course, a settled rule that the Crown is not bound by a statute unless there can be gathered from it an intention that the Crown should be bound, and it has been held that, under the rule, the Crown and its servants and agents are not bound by the Rent Restrictions Act. In considering whether any subordinate body is entitled to this Crown privilege the question is not so much whether it is an 'emanation of the Crown' a phrase which was first used in *Gilbert* v. *Trinity House Corporation*[3], but whether it is properly to be regarded as the servant or agent of the Crown. In the case of the British Transport Commission this depends on the true construction of the Transport Act, 1947".

The learned Lord Justice then analysed these provisions which bore considerable resemblance to those of the Life Insurance Corporation Act, 1956, in these terms :

"The Transport Act, 1947, brings into being the British Transport Commission which is a statutory corporation of a kind comparatively new to English Law. It has many of the qualities which belong to corporations of other kinds to which we have been accustomed. It has, for instance, defined powers which it cannot exceed, and it is directed by a group of men whose duty it is to see that those powers are properly used. It may own property, carry on business, borrow and lend money, just as any other corporation may do, so long as it keeps within the bounds which Parliament has set, but the significant difference in this corporation is that there are no shareholders to subscribe the capital or to have any voice in its affairs. The money which the Corporation needs is not raised by the issues of shares, but by borrowing, and its borrowing is not secured by debentures, but is guaranteed by the Treasury. If it cannot repay the loss falls on the Consolidated Fund of the United Kingdom, that is to say, on the tax-payer. There are no shareholders to elect the directors or to fix their remuneration. If it should make losses and be unable to pay its debts, its property is liable to execution, but it is not liable to be wound up at the suit of any creditor. The tax-payer would, no doubt, be expected to come to its rescue before the creditors stepped in. Indeed, the tax-payer is the universal guarantor of the Corporation. But for him it could not have acquired its business at all, nor could it now continue it for a single day......

1. (1952) 1 All E.R. 314.
2. L.R.(1950) 1 K.B. 18.
3. L.R. 17 Q.B.D. 795.

The protection of the interests of all these—tax-payer, user and beneficiary—is entrusted by Parliament to the Minister of Transport. He is given powers over this corporation which are as great as those possessed by a man who holds all the shares in a private company, subject, however, as such a man is not, to a duty to account to Parliament for his stewardship. It is the Minister who appoints the directors—the members of the Commission—and fixes their remuneration. They must give him any information he wants, and, lest they should not prove amenable to his suggestions as to the policy they should adopt, he is given power to give them directions of a general nature in matters which appear to him to affect the national interest, as to which he is the sole judge, and they are then bound to obey. These are great powers, but still we cannot regard the corporation as being his agent, any more than a company is the agent of the shareholders or even of a sole shareholder. In the eye of the law the corporation is its own master and is answerable as fully as any other person or corporation. It is not the Crown and has none of the immunities or privileges of the Crown. Its servants are not civil servants, and its property is not Crown property. It is as much bound by Acts of Parliament as any other subject of the King. It is, of course, a public authority and its purposes, no doubt, are public purposes but is not a Government department nor do its powers fall within the province of Government.

We do not find it very useful to draw analogies from other bodies which are differently constituted and differently controlled and exist for different purposes. The Territorial Forces Association, for instance, is not concerned with commercial matters, but with the defence of the realm, which is essentially the province of Government, and it is, therefore, to be considered as agent of the Crown. The Post Office is the nearest analogy. It is, of course, concerned with commercial matters, but it is, nevertheless, a government department and its servants are civil servants. That is, however, an anomaly due to its history. The carriage of mail was a Crown monopoly long before the Postmaster-General was incorporated. But the carriage of passengers and goods is a commercial concern which has never been the monopoly of anyone and we do not think that its unification under State control is any ground for conferring Crown privileges on it.

The only fact in this case which can be said to make the British Transport Commission a servant or agent of the Crown is the control over it which is exercised by the Minister of Transport, but there is ample authority both in this Court, and in the House of Lords for saying that such control as he exercises is insufficient for the purpose. When Parliament intends that a new corporation, should act on behalf of the Crown, it, as a rule, says so expressly, as it did in the case of the Central Local Board by the Town and County Planning Act, 1947, which was passed on the very same day as the Transport Act, 1947. In the absence of any such express provision, the proper inference in the case, at any rate, of a commercial corporation is that it acts on its own behalf, even though it is controlled by a Government department. In our opinion therefore, the British Transport Commission is not a servant or agent of the Crown and its property is as such subject to Rent Restriction Acts as the property of any other person."

An useful and instructive commentary on *Tamlin* v. *Hannaford*[1], is to be found in the judgment of Devlin, J., in *Back Voor Handel* v. *Slatford*[2]. The question which the learned Judge had to consider was whether the custodian of enemy property was or was not within the Income-tax Act. He would not be if he was the agent of the Crown acting on its behalf or a servant of the Crown. In dealing with this matter Devlin, J., said :

"The most recent decision on this topic is that of the Court of Appeal in *Tamlin* v. *Hannaford*[1] in which the Court formulated the question as being whether the person or body claiming Crown privilege was properly to be regarded as the servant or agent of the Crown. In the earlier cases looser expressions had been used and references made to 'emanations' of the Crown, 'shields', 'arms and hands' and even in one case to the 'contagion' of Crown immunity. These expressions were criticised by the Privy Council in *International Railway Co.* v. *Niagara Parks Corporation*[3] as well as in *Tamlin* v. *Hannaford*[1]. Both tribunals expressed a preference for the term 'servant or agent' over such undefined words as 'emanation'. I, of course, accept this view, but I would respectfully observe that the term 'servant or agent' gives an appearance of precision which may on this subject-matter be misleading. Before the days of the constitutional monarchy, it would have been easy to ascertain who were the King's servants by looking in each case to see whether the ordinary incidents of the relationship of master and servant were present. Most of the great offices of State have their origin in the appointment by the King of men who owed to him personally the same duty of obedience that every servant owes to his master. But from the time that the king became constitutionally bound to act on the advice of his Ministers the ordinary master and servant relationship ceased. It is no longer practicable or useful to inquire whether a Secretary of State has to do what the King tells him to do. Meticulous devotion to theory might have kept the relationship alive as a legal fiction, but even as a fiction it has been largely ignored and overlaid. When the powers and duties of the executive had in the nineteenth century to be extended to match the increasing complexity of Government, the process was not performed by adding to the powers and duties of the Sovereign which he would be presumed to instruct a Minister to exercise for him, but by bestowing the power or imposing the duty directly on the appropriate Minister. Instead of expressly extending the limits of the prerogative to cover such matters as, for example, education and health, it was simpler to provide for the

1. (1949) 2 All E.R. 328 : L.R. (1950) 1 K.B. 18.
2. (1952) 1 All E.R. 314 (324).
3. (1941) 2 All E.R. 462.

appointment first of Boards and then of Ministers and to give to them necessary powers. Similarly, since Parliament could not, without openly disregarding the theory of the King's supremacy and making him answerable to Parliament, require him to discharge specific duties, it was necessary to lay the task on the Minister or servant.

This has produced some uncertainty about what exactly a lawyer means when he talks of 'the Crown'. There are passages in Maitland's Constitutional History of England which are illuminating on the topic. As Maitland says, the Crown is a convenient term, but one which is often used to save the asking of difficult questions. It is a description of the powers that formerly at common law were exercised by the King in person and that latterly have been bestowed by statute on the King in council or on various Ministers. There is, I think, uncertainty about what is meant by the Crown and uncertainty about who are its servants or agents. The only thing that is reasonably certain is that service or agency is not in this connection to be ascertained in the ordinary way. This is clear from the fact that in what is the first and leading authority on this topic, *Mersey Docks* v. *Cameron*[1] the term is plainly not used in any precise sense. Blackburn, J. treated the exemption as extending not only to servants of the great departments of state who 'might strictly be called the servants of the Crown' but also to persons who 'might be considered in *consimili casu*'. Those he defined as persons whose occupation (the case was concerned with exemption from rates) was for purposes which were all public purposes.

'of that kind which, by the constitution of this country, fall within the province of Government, and are committed to the Sovereign'.

The claim is wide enough to include such persons as Justices of the peace, who are not in any sense servants of the Crown, but whose occupation of Courts, etc., is for public purposes within Blackburn, J.'s. description; see *Coomber* v. *Berks, JJ.*[2]. In *Mersey Docks* v. *Cameron*[1] Lord Westbury, L.C. described public purposes as

'such as are required and created by the Government of the country, and are therefore to be deemed part of the use and service of the Crown.'

and Lord Cranworth (*ibid* 508) spoke of extending 'the shield of the Crown to what might more fitly be described as the public Government of the country.'

In *Coomber* v. *Berks, JJ.*[2] at page 70, Lord Blackburn referred to 'purposes of the administration or those purposes of the Government which are, according to the theory of the Constitution, administered by the Sovereign'. Earlier he had referred to preservation of order and prevention of crime as among 'the most important functions of Government' and had said that 'by the constitution of this country these functions do, by common right, belong to the Crown.' In *Tunnicliffe v. Birkdale Overseers*[4], Lord Esher, M.R., refers to.

'. . . . persons who must be considered as servants of the Crown, because entrusted with the performance of duties forming part of the functions of the Sovereign.'

These citations and the consideration which I have earlier set out, satisfy me that the expression 'servants or agents of the Crown' when used in *Tamlin* v. *Hannaford*[5] and other authorities is used notionally or descriptively and not definitely. The description 'servant of the Crown' has a meaning of course that as 'public servant' has a meaning, but it has no longer a precise legal meaning. It appears at first sight to afford an exact criterion for determining Crown privilege, but on inspection the apparition fades into the same insubstantiality that has dissolved the 'emanation' and other metaphors which have merged from the nebula. I respectfully think that the best and most accurate descriptive phrases are those used by Scott, L.J. in *London County Territorial and Auxiliary Forces Association* v. *Nicholas*[6] and I shall return to them later.

I have said enough to show that I cannot accept the first submission of the counsel for the plaintiffs that the Custodian is a servant of the Crown in the strict sense. The submission fails because there is not, in my view, any strict sense at all, and I have dwelt on the matter because I think that the submission confuses the inquiry. It makes one suppose that the problem can be solved by looking for what are normal incidents of ordinary service and counting their presence or absence as determinative. Submission to orders lies at the heart of the service or agency, and, if the obligation to obey cannot be discovered, I do not think it avails to search for other quite usual incidents of ordinary service. The plaintiffs point out that the Custodian is appointed by the Board of Trade. So are many other functionaries such as the Public Trustee and the Official Receiver, and, if there be a doubt whether such functionaries are servants of the Crown, there can be none in the case of those Judges and Magistrates who are appointed by the Lord Chancellor and can be removed by him. Likewise the servants of many public boards and corporations are appointed by a Minister of the Crown. The Custodian, like any civil servant, is paid out of the Consolidated Fund—so also, I suppose, are the Speaker of the House of Commons and all judicial officers. So, a private person may appoint a trustee for a certain purpose, pay him, and reserve the right to direct him on a number of matters but he does not thereby make him his servant.

Crown status is clearly enjoyed by all those officers of State who obtain it by virtue of the fact that their predecessors were once truly servants of the King; likewise it extends to their subordinates. It must extend also to those new officers created by Parliament who, by the designation that it confers on them, such as Minister of the Crown, Parliament clearly intends shall have the same status. It is

1. (1865) 11 H.L.Cases 464.
2. (1883) 9 A. C. 61.
3. 11 H.L. C. 505.
4. (1888) 20 Q.B. 455.
5. (1949) 2 All. E.R. 328.
6. L.R. (1949) 1 K.B. 35.

when Parliament creates a new office without any clear designation that the difficulty arises. . . . Is the 'province of Government' that attracts Crown immunity co-extensive with the general executive Government of the country ? Or is the immunity restricted to those discharging duties, which, judged by some historical test or otherwise, fall peculiarly within the functions of the Sovereign ? There are authorities which point either way and some of the dicta which I have cited above may be said to support either contention.

If the custodian is an officer of the executive at all, I think he must have Crown status, for his duties bring him within the sphere of two of the most ancient and peculiar prerogatives of the Crown—the power to make war, including the power to take for itself the property of an enemy found within the realm, and the power to make peace.

In the case of a commercial corporation control may be unimportant. In the case of an official who has functions of a Governmental character, it is, I think, a matter to be given considerable weight. If Parliament intended the Custodian to act, as it were, in opposition to the prerogative, it is hardly likely he would have been subordinated in so many matters to the Board of Trade."

The law as stated by Devlin, J., has to be understood subject to the comment made on it by House of Lords affirming his decision (*Bank Voor Handel En Scheepvarrt* v. *Administrator of Hungarian Property*[1], comment which has immediate application to the point under discussion before us. Lord Reid observed (at p. 616) :

"It was suggested by Devlin, J., at one point in his judgment in this case that there is now no such thing as a servant of the Crown in the strict sense. I cannot agree. Ministers are pre-eminently Her Majesty's servants . . a purist might find some anomaly in that because by constitutional practice the Sovereign can only act on the advice of a Minister. But no one denies that Ministers come within the category of servants of the Crown for the present purpose. And with regard to others I can see no difficulty at all. The Crown (through or with the advice of a Minister) controls them and directs their activities in a way which to my mind makes the term 'servant' quite appropriate. In my judgment the question whether the custodian is a servant of the Crown depend on the degree of control which the Crown through its Ministers can exercise over him in the performance of his duties. The fact that a statute has authorised his appointment, is, I think, immaterial, but the definition in the statute of his rights, duties and obligations is highly important. In the ordinary way, a civil servant's duties are not prescribed, though his salary may be fixed in Parliment and I have no doubt that he is a servant of the Crown. But when a statute creates an office it may give to the holder more or less independence from ministerial control so that the officer has to a greater or less extent a discretion which he alone can exercise, and it may be that the grant of any substantial independent discretion takes the officer out ofthe category of servants of the Crown for the present purpose."

Having considered the question carefully we are unable to distinguish the case before us from that which Denning, L.J., had to deal with in *Tamlin* v. *Hannaford*[2]. Though in common with post-war legisation creating public corporation there is a reservation of power in favour of the Government or the Minister in a form of which the earliest is perhaps S. 3 (1) of the Coal Industry Nationalisation Act which ran :

"3 (1) : The Minister may, after consultation with the Board give to the Board directions of a general character as to the exercise and performance by the Board of their functions in relation to matters appearing to the Minister to affect the national interest, and the Board shall give effect to any such directions ".

Corresponding to section 21 of the Life Insurance Corporation Act the same provisions occurred in the Transport Act which was the subject of consideration at the hands of Denning, L.J., and was held not sufficient to render the Corporation a department of State.

The only distinguishing feature on which some stress was laid was insurance was a nationalised business.

In this connection the learned Advocate-General urged that the Union and the States had under the Constitution a right to carry on business as part of their governmental functions and that this indeed was implied or inherent in the social objectives envisaged as the ideal which the Constitution holds up. He pointed out that if, without any attendant legislation, a business activity was set up by the Government, there could be no doubt that the activity would be governmental in its essence notwithstanding its being also commercial. The next step in the argument was that the existence of legislation would or ought to, make no

1. L.R. 1954 A.C. 584. 2. L.R. (1950) 1 K.B. 18 : (1949) 2 All.E.R. 328.

difference. Legislation he said became necessary for the creation of a body for the management of the Life Insurance Corporation for two reasons : (1) There was an acquisition of the assets of the existing companies which was effected by a process different from the compulsory acquisition under the general acquisition Acts. (2) The Government created for themselves the sole ownership of that business, in other words, they excluded private enterprise from this field. For these purposes legislation was essential. So far there could be no dispute, nor any doubt, that at that stage it was open to the Government to have created a wing, so to speak, of the Ministry of Finance or the Ministry of Economics to carry on this insurance business. But this was not what was done. The Government did not desire to assume the responsibility for the day-to-day administration. For that purpose, Parliament created an autonomous Corporation, though sufficient power to control and guide its general policy was vested in the Government. The object and purpose of the statute was the creation of a body autonomous in regard to its day-to-day administration and free from ministerial control except as to broad lines of policy, and therefore outside plenary Parliamentary surveillance, save perhaps in regard to the directions given by the responsible minister under section 21. It was this freedom that was sought to be achieved by the creation of a separate legal entity in the form of a statutory Corporation. There was not, therefore, merely a difference in form between a department of the Government and this statutory Corporation but one in substance. The necessary concomitant of the form, with this difference in substance was to remove it, so to speak, from its character as a Government department and to render it the same type of body as that with which Lord Denning had to deal in *Tamlin's case*[1]. It appears to us therefore that in these circumstances it would run counter to the very intentions of Parliament to hold that the newly created body was either a Government department of a servant or agent of the Government.

We shall next examine some consequences which would follow if such Corporations were held to be Government departments in order to ascertain how far these afford a confirmation of the view we have just now expressed.

If a public Corporation created under a statute be held to be a Government department or at least a servant or agent of the Government, it would logically follow that persons employed by these Corporations would be persons holding posts in a public service in connection with the affairs of the Union or of the State, dependant upon whether the Corporation was created by the Union or the State Legislature. If so the Common law rule that service under the Crown was held at pleasure embodied in Article 311 of the Constitution as well as the constitutional safeguards which the article provides for Government servants, would be attracted to determine the conditions of service under such bodies. This question has come up before the Courts on several occasions and has been uniformly answered against the applicability of Article 311 to such employees. These decisions dealt with two types of cases ; (1) those in relation to Municipal employees or employees of local authorities as defined by the General Clauses Act including in this category employees of State Regional authorities such as Port Trusts, (2) Public Corporations created for carrying on state undertakings. The decisions, however, drew no essential distinction as regards the principles applicable as between the two categories. Falling under the first head was *Mangal Sain* v. *State of Punjab*[2], which was concerned with an executive officer of a Committee. The learned Judges of the Punjab High Court held that the service of such officer was not governed by Article 311. They negatived this contention urged on behalf of the officer by pointing out that Chapter XIV of the Constitution in which Article 311 is found opens with Article 308 in which 'State' is defined as meaning a State specified in Part A or Part B of the First Schedule. This definition they contrasted with Article 12 where the expression 'State' was for the purpose of Part III defined so as to include the Government and Parliament of India and the Government and Legislature of each of

1. L.R. (1950) 1 K.B. 18. 2. A.I.R. 1952 Punjab 58.

the States *and all local or other authorities within the territory of India or under the control of the Government of India.* From this they drew the inference that an employee of a local authority was not an employee of the State within Article 308 and therefore not within Article 311. The learned Judges also referred to Article 321 under which Parliament or the Legislature of a State may provide for vesting in the Union Public Service Commission or the State Public Service Commission, as the case may be, additional functions in regard *to services under any local authority or other body corporate constituted by law or of any public institution.* This was treated as a clear indication that a civil servant of the State or of the Union in Article 311, etc., was not the same as those in the *service of a local authority or body corporate constituted by law or any public institution. Bibhuti Bhusan* v. *Damodar Valley Corporation*[1], fell under the second head and related to an employee of the Damodar Valley Corporation. Bose, J., of the Calcutta High Court held that it was not necessary that the terms or conditons of service of the servants of the Corporation should conform to the requisites of Chapter XIV of the Constitution and that no notice to show cause need precede the termination of their services as required by Article 311 (2). The learned Judge in repelling an argument that an employee of Corporation was a servant of the Union or the State Government said :

"The agreement of service. . . . shows that the appointment was made by and under an order of the respondent Corporation. The different provisions of the Damodar Valley Corporation Act, 1948, indicate that the Corporation has a separate and independent existence and is a different entity from the Union or State Government. This Corporation has properties vested in it under the Act. It has its own fund and its functions and duties are defined in the Act. It may be that this Corporation has been set up by the Government for the purpose of discharging certain functions of the Union or the State Government, but there can be no doubt that it has a separate existence and cannot be considered as a part of the Union or State Government. Just as the Corporation of Calcutta discharges certain duties and functions which are to be performed by the State Government so also certain functions and duties of the Union and the State Governments have been allocated to the Damodar Valley Corporation but the Corporation performs these duties and functions as a separate entity."

The status of the Managing Director of the Patiala State Bank who was also the economic adviser to the Government of the Patiala State was the question decided by *S. Mohany* v. *P. & E. P. States Union*[2], which in its essential facts really fell on the other side of the line. The Bank of Patiala was owned by the State and controlled and managed by the State Government and this was the basis for the argument that the Managing Director of that Bank held a civil post under Article 311. Though it was incorporated by law the learned Judges recorded a finding that it was not an independent and separate legal entity, that is, it was not an institution which was a distinct legal person apart from the State. The learned Judges also negatived the argument of the Advocate-General that the Bank was "other authority within the territory of India" within Article 12 of Constitution. They said :

"The Bank of Patiala is, thus a commercial concern of the Pepsu Government, financed, managed and controlled by the Government though in its internal management the Government obtains full and complete assistance from the Board of Directors set up by it for the more efficient and business-like running of the bank and the present arrangements do not make it an independent and distinct legal entity or corporation and so it cannot be divorced from the civil administration of the State Government."

The learned Judges, however, held that the termination of the service was in accordance with the contract of employment and therefore did not give rise to any complaint to be remedied by Court under Article 226.

Nagendra Kumar v. *Commissioner, Port of Calcutta*[3], dealt with a case of an employee of the Calcutta Port Trust. The case before the Court proceeded on the admission by the counsel that Article 311 did not govern the conditions of service of the employees. Similarly, in *P. P. Bose* v. *Commissioner for Port of Calcutta*[4], it was conceded that Article 311 did not apply to an employee under the Calcutta Port Trust. The

1. A.I.R. 1953 Cal. 581.
2. A.I.R. 1954 Pepsu 136.
3. A.I.R. 1955 Cal. 56.
4. A.I.R. 1957 Cal. 720.

learned Judge cited the decision of the *Damodar Valley Corporation*[1], as supporting this concession. *Chaturbhuj* v. *Bihar State Corporation Bank Ltd.*[2] related to an employee of the Bihar State Co-operative Bank which was an incorporate body. The learned Judges recorded :

> " It is true that the State Government does exercise some control over the Co-operative Bank by virtue of the authority given under some of the provisions of the Bihar and Orissa Co-operative Societies Act, 1935. That does not, however, mean that the petitioner holds a civil post under the State of Bihar. There are many enactments under which the State Government exercises control over statutory bodies or local authorities constituted by statute. That does not, however, mean that persons who serve under those statutory bodies or local authorities hold civil posts under the State of Bihar within the meaning of Art. 311 of the Constitution of India."

The High Court of Patna had to consider the position of an employee of the Sindri Fertilisers in *Subodh Benjan* v. *Sindri Fertilisers and Chemicals, Ltd*[3]. This was a public corporation created by the statute. The petitioner complained that he was discharged from service without notice and without opportunity to show cause and without consultation with the Union Public Service Commission, these being alleged as violations of Articles 311 and 320 of the Constitution. How this company came to be formed was briefly this. The Government of India had a fertiliser project at Sindri. This company was formed to take over its assets. The petitioner had originally been in the service of the Government of India but with the consent of the petitioner his services were terminated and he accepted service under the Company from the same date. The question, however, raised was whether the service under the Company was still service under Government. The argument for the affirmative was based on the ownership and control of the Company being vested completely in the Union Government. All the shares issued were held either by the President of India or by the Secretary of the Ministry of Production. The company was formed with a capital of Rs. 30,00,00,000 consisting of three lakhs of shares valued at Rs. 1,000 each. Out of these 2,99,999 shares were held by the President in his official capacity and the remaining one by the Secretary of the Production Ministry. The directors of the company were appointed by the President who had also authority under the Articles of the Association to remove any director from office in his discretion. It was, therefore, contended that the management of the company was subject to the full control of the Union Government not only in the matters of policy but also in every other matter. The power to give directions was contained in Article 110 which ran : "to issue such directives as he considers necessary in regard to the conduct of the business." The submission on behalf of the petitioner was that the Company was " an emanation " of the Union without having any independent legal existence. This argument was negatived, the grounds being (1) that the Company was a legal entity havinga separate legal existence being different from the shareholders, namely, the President of India and the Secretary to the Government ; (2) financially, the Company was a separate entity having its own share capital ; (3) the Company was a public authority. Its purposes were public purposes and it was not a Government department. Reference was made to Tamlin's case: *Tamlin* v. *Hannaford*[4] and it was held that the reasoning in that decision concluded the point against the petitioner.

Rangnath Misra v. *Chairman, District Board*[5], related to an employee of a District Board. The contention that Article 311 applied to the petitioner was repelled without argument by stating that the Service under the District Board did not attract Article 311.

State of Punjab v. *Prem Parkash*[6], was a similar case concerning an employee of a Municipal Council. The learned Judges said that the Municipality dealt exclusively with local affairs as distinguished from that related to the State at large or the general public. Their servants performed merely a municipal as distinguished from a State function.

1. A.I.R. 1953 Cal. 581.
2. A.I.R. 1955 Pat. 223.
3. A.I.R. 1957 Pat. 10.
4. L.R. (1950) 1 K.B. 18.
5. A.I.R. 1957 Pat. 333.
6. A.I.R. 1957 Punjab 219.

The learned Advocate-General pointed out that these decisions would not affect his main thesis and that they could be explained on the basis of the historical background of Article 311. In addition it might be urged that the expression "public services and posts in connection with the affairs of the Union and of any State" occurring in Article 309 ought to receive a limited construction so as to exclude service under "a local authority or other body corporate constituted by law" in the light of the provisions in Article 321. Besides it is obvious that though a person employed in the public service holds an office of profit, the converse that every person who holds an office of profit is a person falling within Article 311 does not follow. We are, therefore, not inclined to hold that notwithstanding the logic of it, the inapplicability of Article 311 by itself and without anything more takes a service outside Article 191 (1) (*a*).

The question whether debts of the statutory public Corporations, such as we have on hand, would have priority in payment in bankruptcy or in a winding up sometimes has come up before the Courts. In *Metropolitan Meat Industry Board* v. *Sheedy*[1], the Privy Council held that the amounts due to the Meat Board were not entitled to priority as Crown debts. The Meat Board was constituted under the Meat Industry Act, New South Wales. The Board was appointed by Government who could veto its decisions. But the Board had wide powers and a considerable amount of discretion. Lord Haldane said that even if the Minister had powers to interfere with the acts of administration they did not become his acts as distinguished from those of the Board. That they were an incorporated body was not really determinative but the matters which were held to be relevant were (1) the wide discretion that was vested in the Board; (2) that the receipts of the Board did not form part of the general revenues; (3) lastly that the charges which the Board levied went into a fund of its own.

If this point regarding priority had to be decided on the terms of the Indian Companies Act or the Insolvency Acts in India, the debts due to statutory corporations like the one before us would certainly not be "debts due to the State". Further the Revenue Recovery Acts whereby "sums due to the State" and "the Union Governments" could be recovered by summary process without recourse to suits could not be held to apply to debts due to Public Corporations notwithstanding that such Corporations might be performing public functions. In fact it is by specific provisions in statutes that such summary processes are extended to sums other than revenue or taxes due to Government. Again Article 149 of the Limitation Act enacts a special rule of limitation for suits by and on behalf of Central Government or any State Government. It would need much straining of language to hold that a suit by such public Corporations could be held to fall within this provision particularly when it is read in conjunction with Article 146-A which refers to suits by local authorities. Next we have the provision in section 80, Civil Procedure Code, regarding the notice that must precede any suit against Government, Union and State. Here again no decision has ever held that it was applicable to any other body than Government departments as such, *i.e.*, that it was applicable to public Corporations, notwithstanding that the functions which the latter discharge might form part of a legitimate activity of the Government of the State or Union. In line with this we have the provisions of the Civil Procedure Code, Order 29. This again cannot apply to any person other than the Government strictly so called. Lastly reference may be made to Article 285 of the *Constitution* which refers to the property of the Union and provides for its exemption from all state taxation. Could it for a moment be contended that this would include the property of Corporations created by the Union Government? The net result of this discussion therefore is that a public Corporation of the type before us cannot be identified with the State or be treated as the servant or agent of the State.

The learned Advocate-General referred us to section 2 (*a*) (1) of the Industrial Disputes Act where a reference is made to the Central Government as being the

1. L.R. (1927) A. C. 899.

appropriate Government in relation to disputes concerning an industry "carried on by or under the authority of the Central Government". Phrases of the same type occur in the definition of "employer" in section 2 (*g*) of that Act but these do not advance the position. We are unable to hold that the mere fact that the provisions of the Industrial Disputes Act are made applicable to public corporations or that the Central Government are designated the appropriate authority in such cases, necessarily connotes that the body constituted for carrying on the business is thereby rendered a department of the Government. This has to be judged with reference to other criteria such as the degree of control and other relevant matters to which we have already referred, and we consider that the provision in the Industrial Disputes Act does not throw any light or furnish any answer to the question now under discussion.

Our final conclusion therefore is that the Insurance Corporation is no wise different from the Transport Commission which was held not to be a department of State by Denning, L.J. As the Supreme Court has pointed out, Articles 48 and 66 do throw some light on the question, and they incline us to hold that service under the Insurance Corporation is not service under Government of the Union, within Article 191 (1) (*a*) of the Constitution.

It was next urged by the learned Advocate-General that to hold that an employee of the Life Insurance Corporation did not hold an office of profit under the Crown would defeat the very purpose of Article 191 (1) and would in effect bring in the evils which that Article was intended to obviate. In this connection he urged that the result of holding that such employees did not hold an office of profit under Government would enable the party in power, if so minded, to reward their supporters in Parliament with appointments under the Corporation and that the very existence of parliamentary democracy would be threatened by such unwholesome practices springing up. We are unable to uphold this argument. The power of appointment of the employees of the Corporation as distinct from the members of the Corporation is under the statute vested in the Corporation itself, and without impairing the autonomy for which the statute makes provision, the Government of the day cannot interfere with this power. There may be the possibility of an abuse of power by the Minister. We cannot, however, consider the possibility of an abuse of power or of patronage as a legitimate or proper criterion for construing the provisions of the Constitution. In this connection it has to be remembered that Parliament is vested with plenary power to designate any office of profit as not entailing a disqualification for being a member of the Legislature. Viewed in conjunction with this, it might very well be that when Parliament set up semi-autonomous bodies of the type we have in the present case, its intention was not to disqualify such office-holders from sitting in Parliament. In other words, by the very form, imparted to the body set up, Parliament might be taken to have evinced its intention not to disqualify such office-holders. But this apart, we feel that this approach is far too much involved in political considerations as to be capable of being taken into account in a mere interpretation of the Constitution.

In this connection we cannot omit from considerations the provisions contained in sections 7 and 8 of the Representation of the People Act, 1951, as a parliamentary exposition or commentary on the meaning of the expression 'office of profit' under the Union or State in Article 191 and which are designed to supplement the disqualifications contained in the Constitution. The provisions in section 7 which we have in mind is sub-clause (*e*) :

" 7. A person shall be disqualified for being chosen as, and for being, a member of either House of Parliament or of the Legislative Assembly or Legislative Council of a State.—

. . . .

(*e*) if he is a director or managing agent of or holds any office of profit under, any company or corporation (other than a co-operative society) in the capital of which the appropriate Government has not less than twenty-five per cent. share,"

and section 8 (1):

"Notwithstanding anything contained in section 7—

. . . .

(e) a person shall not be disqualified under clause (e) of that section by reason of his being a director unless the office of such director is declared by Parliament by law to so disqualify its holder.

(f) a disqualification under clause (e) of that section shall not, in the case of a director take effect where the law making any such declaration as is referred to in clause (a) of this section in respect of the office of such director or has come into force after the director has been chosen a member of Parliament or of the Legislature of a State, as the case may be, until the expiration of six months after the date on which such law comes into force or such longer period as the Election Commission may in any particular case allow".

Without doubt, these provisions would apply to the directors and employees of Public Corporations which have a share capital. Such Corporations might be formed for nationalised institutions. The Damodar Valley Corporation, whose set-up we have described earlier, would fall within this category. Public Corporations having a share capital formed for nationalised undertakings like the Reserve Bank or the State Bank would also be comprehended within this class.

These provisions made it clear that these bodies are not treated as departments of the State but that on grounds of public policy, their employees are disqualified from standing for election to the legislative bodies only of the "appropriate Government" which has control over or a financial interest in, such companies or Corporations. If the contention urged on behalf of the Advocate-General were to be accepted, the provision would in large part be superfluous in view of Articles 102 (1) and 192 (1) of the Constitution particularly in the form in which section 7 (e) stood when originally enacted in 1951. It then ran:

"(e) if he is a director or managing agent of, or holds any office of profit under, any corporation in which the appropriate Government has any share or financial control."

Further the provision regarding Directors (as distinguished from Managing Directors and employees) of such bodies contained in section 8 (1) (e) and (f) appears to us to militate against the appellant's submission, in that partliamentary legislation positively disqualifying the incumbent is rendered necessary before the disqualification could operate and even then subject to the qualifications set out in sub-section (f).

In our opinion, these provisions are a pointer that Parliament was not unmindful of the political considerations adverted to by the Advocate-General in regard to the ensuring of the purity of administration and the avoidance of the evil of graft and these therefore afford us a further indication that the phrase 'office of profit under the Government' in Article 191 (1) (a) cannot be construed in the wide sense urged before us by the learned Advocate-General.

We, therefore, hold that the Tribunal was right in treating Krishnamurthi as not disqualified by Article 191 (1) (a) from standing for election to the State Assembly.

The second point urged by the learned Advocate-General was that C. Krishnamurthi was disqualified under Article 191 (1) (e). This provision reads:

"191 (1).—A person shall be disqualified for being chosen as, and for being, a member of the Legislative Assembly or Legislative Council of a State.

. . . .

(e) if he is so disqualified by or under any law made by Parliament.

Section 49 empowers the Corporation to make regulations to provide for all matters for which provision is expedient for the purpose of giving effect to the provisions of

the Act. In particular the Corporation is enabled to make these regulations to provide for :

"49 (1) (*b*).—The methods of recruitment of employees and agents of the Corporation and the terms and conditions of service of such employees or agents".

Under the power thus conferred the Corporation has framed regulations, and among these, Regulation 29 reads :

"29.—No employee shall take an active part in politics or in any political demonstration or stand for election as member for a Municipal Council, District Board or any Legislative Body."

Two questions arise on this regulation: (1) Whether it imposes a disqualification for being a member of the Legislature ; (2) whether this disqualification could properly be described as one imposed "by or under any law made by Parliament". The Election Tribunal upheld the respondent's contention, that a regulation made by the Corporation under section. 49 would not constitute a disqualification imposed "by or under any law made by Parliament". It therefore did not consider the first point which we set out above.

That the Article in the Constitution draws a distinction between a disqualification imposed "by" a law made by Parliament and one imposed "*under*" a law made by Parliament would appear to admit of no doubt. Nor is that distinction far to seek. A disqualification would be imposed "*by*" a law made by Parliament when the Parliamentary statute directly enacts the disqualification or imposes a prohibition upon certain persons to stand for election. The words "under a law" would, in our judgment, signify those cases where the disqualification is not to be found in the Parliamentary statute itself but is imposed by virtue of powers enabling this to be done ; in other words, where it is imposed by a law made by a subordinate law-making authority. Examples are numerous which bring out this distinction. For instance there are statutes which set up Corporations and which in terms incorporate those bodies. The Life Insurance Corporation created under the Life Insurance Act, 1956, is an illustration of such a method of incorporation. So are Municipal Corporations, Cantonment Boards, which are incorporated by the State and Central Legislation. As contrasted with this, we have companies and co-operative societies which attain incorporation by registration under the Companies Act and the Co-operative Societies Act respectively. This latter category is properly designated as incorporated "under" a statute. It is this idea which is expressed in the following passage in Stroud's Judicial Dictionary dealing with the word "by" ; "A Company 'incorporated by Act of Parliament' means one which 'by' an act is brought into existence, and does not include a company incorporated 'under' an Act ; therefore, a power to invest in the shares, etc., of a company incorporated 'by' an Act does not include the shares, etc., of a company registered under The Companies Act, 1862, (Re *Smith*[1]." This distinction is too well known to need any further elaboration.

Learned counsel for the respondent urged that though a rule made by the Central Government under section 48 of the Act would be "a law by Parliament, a regulation made by the Corporation would not be such a law". We feel unable to perceive this distinction. The ultimate sanction for the rule is the Act of Parliament—the Life Insurance Act—and the validity of the rule rests on the power of the Parliament to delegate, so to speak, a subordinate legislative power to the Central Government ; and so long as the power to delegate does not exceed well-known limits, the rule made in pursuance of the delegation has the same validity and the same characteristic as a law made directly by Parliament. If this were the rationale behind the binding character of a rule framed by the Central Government, we do not see how this principle would not apply to the Regulations made by the Corporation under a valid regulation making power. Parliament has a wide power in choosing the mechanism by which subordinate legislation could be brought into existence, and we can see no principle in drawing any distinction between the repositories of

1. L.R. (1896) 2 Ch. 590.

this power, as having any effect upon the result and legislation being properly described as a law made 'under' an Act of Parliament. The basis upon which the Election Tribunal has rejected the point urged on behalf of the appellant must therefore be held to be erroneous.

Learned counsel for the respondents urged that even if the Regulation made by the Insurance Corporation be a *law* which satisfied the last part of Article 191 (1) (*e*), still it did not impose a disqualification upon the employees of the Corporation from being members of the Legislature. The argument was that Regulation 29 was merely a rule of conduct prescribed for the employees of the Corporation, the breach of which might result in disciplinary action being taken against them, but that it did not render the employees disqualified for standing for election. Though the point is not free from difficulty, we have reached the conclusion that this argument of the respondents must be rejected. We see no distinction between a legal prohibition against a person standing for election, and the imposition of a disqualification on him so to stand. It might be that the object of the regulation was to ensure that the employees of the Corporation bestowed undivided attention upon their duties as such employees, but this does not militate against the prohibition operating as a disqualification. If a person is disabled by a lawful command of the Legislature, issued directly or mediately, from standing for election, it is tantamount to disqualifying him from so standing. We, therefore, hold that Regulation 29 framed by the Life Insurance Corporation constituted a 'law' which disqualified C. Krishnamurthi from standing for election under Article 191 (1) (*e*) of the Constitution.

The appeal is accordingly allowed and as the improper rejection of the nomination paper was the only ground urged for the setting aside of the election and we have rejected this contention, this election petition 178 of 1957 fails and is dismissed. There will be no order as to costs.

R.M. ——— *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE. AT MADRAS.

PRESENT :—MR. JUSTICE RAMASWAMI.

Coimbatore Municipality by Commissioner .. *Petitioner**

v.

K. L. Narayanan .. *Respondent.*

Criminal Procedure Code (V of 1898), section 417 (4)—Delay in applying for Special Leave—If could be excused—Limitation Act (IX of 1908), section 5—Applicability.

The Code of Criminal Procedure is a general law relating to procedure and not a special law within the meaning of section 29 of the Limitation Act. Hence section 5 of the Limitation Act is applicable in terms to applications for Special Leave under section 417 (4) of the Code of Criminal Procedure and the delay, if any, in filling such an application can be excused.

Petition praying that in the circumstances stated therein and in the affidavit filed therewith the High Court will be pleased to excuse the delay in filing Crl.M.P. No. 1276 of 1957 for special leave to appeal (C.A. No. 767 of 1957 on the file of the High Court) against the order of acquittal made by the Second Class Bench of Magistrates, Coimbatore, dated 13th August, 1957, in C.C. No. 1157 of 1957.

S. Mohan Kumaramangalam and *N. Natarajan*, for Petitioner.

V. T. Rangaswami Ayyangar, for Respondent.

V. V. Radhakrishnan for The Public Prosecutor (*P. S. Kailasam*) for State.

The Court made the following

ORDER.—The point that arises for determination is whether when there is a delay beyond 60 days in preferring under section 417 (4), Criminal Procedure

*Crl.M.P. No. 1275 of 1957. 14th February, 1958.

Code, an application for granting special leave to appeal, the provisions of section 5 of the Limitation Act will apply.

Section 29 (2) of the Limitation Act runs as follows :

"Where any special or local law prescribes for any suit, appeal or application a period of limitation different from the period prescribed therefor by the First Schedule, the provisions of section 3 shall apply, as if such period were prescribed therefor in that schedule, and for the purpose of determining any period of limitation prescribed for any suit, appeal or application by any special or local law—

(*a*) the provisions contained in section 4, sections 9 to 18, and section 22 shall apply only in so far as, and to the extent to which, they are not expressly excluded by such special or local law and.

(*b*) the remaining provisions of this Act shall not apply."

This question has been the subject-matter of a decision in this Court by Basheer Ahmed Sayeed, J., and in two decisions of the Andhra Pradesh High Court by Umamaheswaram, J., and a Bench of that Court composed of the learned Chief Justice and Basi Reddy, J.

Basheer Ahmed Sayeed, J., in In re *Viswanathan Chettiar*[1], held that section 5 of the Limitation Act would apply to applications of this nature on the ground that only where there is difference between the period prescribed by the Limitation Act and the period prescribed by the special law, section 29 (2) would be applicable and section 5 would not be available, and that in the case of special leave against acquittal the schedule to the Limitation Act not prescribing any period and thereby no difference between the period prescribed by the schedule and the period prescribed by the special law, section 29 (2) of the Limitation Act would not be applicable. Therefore, he held that section 5 can be applied.

I do not wish to express any disagreement with this view, but we are on stronger ground on the basis on which this application of section 5 has been rested by the Andhra Pradesh High Court. In *Venkatasubba Reddi* v. *Duvvuru*[2], Umamaheswaram, J., held that the Code of Criminal Procedure is a general law relating to procedure and not a special law within the meaning of section 29, Limitation Act. As section 5, Limitation Act, applies to appeals, it equally applies to all applications for leave to appeal whether provided under Schedule 1 of the Limitation Act or not. It is only in respect of application other than applications for leave to appeal or for review of judgment that the terms of section 5 should be specially made applicable. Hence the terms of section 5 are applicable to applications for special leave under the new section 417 (4), Criminal Procedure Code. It is permissible to adopt a beneficient construction of a rule of limitation if alternative constructions are possible. For this purpose *Kandaswami Pillai* v. *Kannappan Chetty*[3] was relied on.

This decision of Umamaheswaram, J., has been followed by the Bench of the Andhra Pradesh High Court composed of Subba Rao, C.J., and Basi Reddy, J., in In re *Barchuri Adiseshamma*[4]. The Bench also held that the Code of Criminal Procedure is not a special law but is a general law relating to procedure, and that therefore section 5 of the Limitation Act applies to an application for special leave made after the period prescribed by sub-section (4) of section 417 of the Criminal Procedure Code and that the High Court can in an appropriate case extend that period.

Therefore, there are no impediments in granting leave to appeal provided there are merits in regard to the reasons put forward for excusing the delay of 31 days in filing the appeal. I heard the learned advocates on both sides and I find the affidavit filed by the applicant-Municipality in support of the application shows sufficient reasons for excusing the delay. The application for excusing the delay is allowed and this appeal is directed to be taken on file and disposed of according to law.

R.M. ——— *Application allowed.*

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1. (1957) 1 M.L.J. 150 : (1957) M.L.J. (Crl.) 64.
2. (1956) An.W.R. 821 : A.I.R. 1957 Andh. Pra. 406.
3. (1951) 2 M.L.J. 668: I.L.R. (1952) Mad. 421 : A.I.R. 1952 Mad. 186 (F.B.).
4. (1958) 1 An. W.R. 75 : (1958) M.L.J. (Crl.) 78.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE PANCHAPAKESA AYYAR AND MR. JUSTICE BASHEER AHMED SAYEED.

K. Somasundaram .. *Petitioner**

v.

Gopal and another .. *Respondents.*

Criminal Procedure Code (V of 1898), section 204 (1-A)—Right of a complainant, in a private complaint to file additional list of witnesses or vary the original list filed—Procedure.

It is no doubt true that section 204(1-A) of the Code of Criminal Procedure, as amended recently, provides that no summons or warrant shall be issued against an accused under section 204 (1) until a list of prosecution witnesses has been filed. But it does not prohibit any variation of the list. Of, course the list of witnesses required to be filed would be a *bona fide* complete list of witnesses so far known or considered by the complainant as necessary for his case. It cannot be a mere nominal list. But in addition to the list initially filed under section 204 (1-A) a complainant can file supplemental list of witnesses. It is also equally open to a complainant to give up some of the witnesses included in his original list. But in such cases it is open to the Court to draw any inference against him if the giving up is *mala fide*. Even so the credibility of the evidence of witnesses named in the supplemental list is a matter for the Court to consider and a Court may test the evidence of the supplemental witnesses with greater scrutiny. When the Magistrate is asked to summon fresh witnesses it is open to him, and it is his duty, to apply his mind to it and decide whether the witnesses are necessary. Till he decide to summon the fresh witnesses mentioned, no notice of it need go to the accused.

Petition under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the orders of the Court of the Special Honorary Presidency Magistrate of the Courts of the Presidency Magistrates, Egmore, Madras, dated 16th September, 1957 and made in M.P. No. 1469 of 1957 in C.C. No. 4747 of 1957.

K. Arunachala Sastri, for Petitioner.

Rangavajjula Krishnamurthy, for Respondents.

The Public Prosecutor (*P. S. Kailasam*) for State.

The Judgment of the Court was delivered by

Panchapakesa Ayyar, J.—This case was directed by the Hon'ble the Chief Justice to be posted before a Bench on the recommendation of Ramaswami, J., that a Bench should hear and dispose of the matter in view of the then existing conflict regarding the legal questions involved in the case between the judgment of Somasundaram, J., in *Ramanathan* v. *State*[1], and a judgment of a Bench of this Court in *Tirmul Thevar* v. *State*[2], and the judgment of Ramaswami, J., in *Arumugam Solathirayar* v. *Ponnalagu Pandrar*[3], and the Supreme Court Judgment indirectly bearing on the question in *Narayana Rao* v. *State of Andhra Pradesh*[4]. Since the reference was made to this Bench, as the learned Public Prosecutor has urged, Somasundaram, J., has, in view of the observations of the Supreme Court in the judgment cited above, modified his original view in *Public Prosecutor* v. *Pachaiappa Mudaliar*[5], the judgment in which were delivered on 21st November, 1957 and remaining unreported till now. In this judgment Somasundaram, J., practically fell into line with the other rulings cited above which have held that the Court has got a discretion to summon witnesses not named in the list filed under section 204 (1-A) of the Criminal Procedure Code. So, at present, there is no real conflict regarding any of the three questions which arise in this case. Still, as a reference has been made to this Bench we shall answer the three questions.

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* Cr. R. C. No. 680 of 1957. 27th January, 1958.
(Cr. R. P. No. 663 of 1957).

1. 1956 M.W.N. (Crl.) 231.
2. (1957) M.W.N. (Crl.) 165.
3. (1957) M.W.N. (Crl.) 125.
4. (1957) 2 M.L.J.(S.C.) 139 : (1957) 2 An. W.R. (S.C.) 139 : (1957) M.L.J. (Crl.) 690 : (1957) S.C.J. 727 (S.C.). (Since reported in).
5. Crl. R. C. Nos. 405 to 407 of 1957.

The first question is whether a private complainant in a summons or warrant case, who has filed a list of prosecution witnesses under section 204 (1-A), can file a supplemental list of witnesses later on, after giving up some or all the witnesses in the first list or in addition to them, and whether the Court can summon and examine them if it thinks fit. The second question is whether he can give up some or all of the witnesses cited in the first list, filed under section 204 (1) of the Criminal Procedure Code, and the third question is whether the Magistrate should apply his mind and direct issue of summons to the witnesses in the supplemental list, or whether he should automatically do so, without using his discretion whether to summon them or not, and whether notice should go to the accused with the list of witnesses named in the supplemental lists.

As the law stands at present, there is no conflict in this respect. The answer to the first question will be that the complainant can file a supplemental list or even a third list, etc., of prosecution witnesses, though he has filed a list of prosecution witnesses under section 204 (1-A) for the purpose of having summons or warrant issued against the accused. The phrase "take all such evidence as may be produced in support of the prosecution" in section 244 (1), and section 244 (2) and section 252 (1) and section 252 (2), Criminal Procedure Code, shows the ample powers of the Court in this respect. Section 204 (1-A) simply says that no summons or warrant shall be issued against the accused under section 204 (1) until a list of prosecution witnesses has been filed. It does not say that that list should be communicated to the accused. Nor does it say that that list shall not be added to or varied from. Of course, it must be taken that the list filed under section 204 (1-A), Criminal Procedure Code, is *not a mere nominal* list, filed just for securing issue of summons or warrant against the accused, but is a *bona fide* list of witnesses so far known to the complainant and considered by him then as necessary for supporting the case he has set out in his complaint. It is, therefore, clear that the list filed under section 204(1-A) can be added by supplemental lists accompanied by applications to the Court to summon those new witnesses. Such supplemental lists can be *in addition* to all the witnesses in the primary list filed by the complainant under section 204 (1) of the Criminal Procedure Code, or in addition only to such of the witnesses in the primary list whom he decides to examine.

The second question is also easy to answer. As the learned Public Prosecutor contended, no complainant can be compelled to examine all the witnesses cited in his list filed under section 204(1) and it must be left to the complainant to dispense with the evidence of those gained over or unnecessary and to examine only the rest. It often happens that some of the witnesses whom the complainant has cited in the list filed under section 204 (1-A) may turn hostile, or some of them may be found, on later reflection, to be unnecessary, so the complainant can dispense with these and examine the rest in support of the prosecution. He may thus give up some or all of the witnesses in the original list. Of course, the Court will advert to his giving up the witnesses mentioned in the original list, and draw an inference against him if such giving up has been, in its opinion, *mala fide*.

The third question can also be answered easily. When the Magistrate is asked to summon fresh witnesses, he must certainly *apply his mind* to the application, and has a duty to do so. For one thing he must weed out obviously frivolous names. Thus, if the complainant frivolously summons the Prime Minister of India or the President of the Indian Republic, or the accused's wife, as supplemental witnesses the Magistrate may refuse to summon them. It is not a case where the Magistrate has no right at all to apply his mind, as contended for by the learned counsel for the complainant or where the Magistrate has no right to summon any additional witness, even after applying his mind, as contended by the learned counsel for the accused. Before the Court applies its mind about summoning the witnesses named in the additional list filed, no notice of the list of the additional witnesses need go to the accused (and the accused heard about it) any more than in the case of the list originally filed under section 204 (1) of the Criminal Procedure Code.

It follows from all these that the order of the Special Honorary Presidency Magistrate, Egmore, Madras, holding that he had no power to examine any witness other than those named by the complainant in the list filed under section 204 (1) of the Criminal Procedure Code and, therefore, declining to examine any of the additional witnesses named in the supplemental list and already summoned by him, is not correct. Of course, the *credibility* or weight, of the evidence of the witnesses named in the supplemental list and examined is a different matter. As held by the Calcutta High Court in *Ali Jan* v. *Amir Khan*[1], the credibility of the evidence of the witness examined before a Magistrate is quite different from the Court's *power to examine* him. The question of credibility of the witnesses will arise not only with reference to the additional witnesses in the supplemental list, but also to the primary witnesses in the original list filed under section 204 (1) of the Criminal Procedure Code, though, of course, there will be a greater inclination on the part of the Court to test the evidence of supplemental witnesses more severely, as they are not included in the original list.

The Special Honorary Magistrate will proceed to examine the additional witnesses summoned by him, and dispose of the case according to law in due course.

R.M. ——— *Petition allowed.*

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1. A.I.R. 1957 Cal. 332.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. P. RAJAGOPALAN, *Officating Chief Justice* AND MR. JUSTICE GANAPATIA PILLAI.

T. N. Kuriakose .. *Appellant**

v.

Mrs. Leelie Kuriakose .. *Respondent.*

Divorce Act (IV of 1869), *section* 36—*Alimony* pendente lite—*Quantum of*—*Net average income*—*What is*—*Cost of the suit*—*Provision for*—*Circumstances to be taken into consideration.*

In suits for divorce possession of independent means by the wife would no doubt be a relevant factor in deciding whether any provision should be made in her favour by way of alimony *pendente lite* or towards her costs of defending the suit. The mere fact that the wife is in possession of certain jewellery which cannot be said to be in excess of what a lady of her status in life could be expected to possess for her personal use, or that she is in possession of certain household utensils or furniture none of which she could be expected to sell for her maintenance or to finance the litigation, is no ground to disallow the claim. In deciding the quantum of alimony *pendente lite* the Court should take into consideration the net average income of the husband, which in cases of salaried persons would mean the salary, less what he has to pay by way of income-tax, contributions towards Provident Fund, etc.

On appeal from the judgment and order of Mr. Justice Balakrishna Ayyar, dated 7th November, 1957 and made in the exercise of the Ordinary Original Matrimonial Jurisdiction of the High Court in Applications Nos. 1455 and 1457 in O.M.S. No. 9 of 1957.

G. Vasanta Pai and *D. Padmanabha Pai*, for Appellant.

E. Antony Lobo, for Respondent.

The Judgment of the Court was delivered by

Rajagopalan, O.C.J.—Despite the range of arguments before us and the persistence and bitterness with which these interlocutory proceedings appear to have been fought out, the only modification, which, in our opinion, is called for in the order of Balakrishna Iyer, J., is the reduction of the quantum of alimony *pendente lite* from Rs. 180 a month which he awarded to Rs. 150 a month to be effective from the date of his order. The appeal will stand dismissed in other respects, but without costs.

There was no acceptable evidence that the appellant's wife had any property which yielded any income. The learned Judge found that she had some jewellery, which was certainly not in excess of what a young lady of her status in life could be expected to possess for her personal use, some articles of furniture and household utensils, none of which she could be reasonably expected to sell either to maintain herself during the pendency of the suit or to finance the litigation, to which she had unfortunately committed herself. It is true there was a necklace of hers worth about Rs. 5,000 which was sold by her father.; the learned Judge took that factor into account, but as he pointed out it was not really cash that was as yet available to the respondent.

We are unable to accept the extreme contention of the learned counsel for the appellant that where the wife was shown to have property of her own, there should be no direction that the husband should pay her any amount to meet the costs of the suit. Possession of independent means would no doubt be a relevant factor in deciding whether any such provision should be made. It was taken into account by the learned Judge, and we see no reason to differ from him. The Rs. 1,000 which he ordered the appellant to pay was by no means excessive in the circumstances of this case.

The learned Judge recorded in effect that during the arguments before him it was conceded that what the wife claimed was true, that the average monthly salary during the relevant period, three years before the date of the order, was Rs. 900. We do not feel called upon to embark upon a fresh investigation of the

* O.S. Appeal No. 39 of 1957. 15th January, 1958.

question of what was the gross average salary of the appellant. He has recently had a rise in his salary. Rs. 900 was the gross average salary. Unfortunately the learned Judge appears to have overlooked that factor; the proviso to section 36 of the Indian Divorce Act prescribes one-fifth of the net average income as the permissible maximum. What the appellant has to pay as income-tax and towards contribution to the Provident Fund will have to be deducted to arrive at the net salary, but not the other deductions claimed by the appel ant. The sum of Rs. 150 a month is a little below that maximum of one-fifth of the net salary, computed on the lines mentioned above. It should be remembered that the respondent has resumed her studies in the college.

Subject to the modification mentioned above the order appealed against will stand confirmed.

R.M. ——— *Order modified.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE RAJAGOPALAN.

Siluvai Fernando, Power-of-Attorney Agent of Savarimuthu Fernando .. *Petitioner*

v.

Pancros Leon .. *Respondent.*

Madras Cultivating Tenants Protection Act (*XXV of* 1955), *section* 4 (5)—*Application by dispossessed person for restoration to possession—Where maintainable.*

In order to entitle a person to apply for restoration to possession of land under the Madras Cultivating Tenants Protection Act, 1955, he must be a cultivating tenant within the meaning of the Act. It means that there should be the relationship of landlord and tenant between the parties.

The mere fact that a person was in possession of land and was cultivating it under an agreement with some one who had no title to the land and who therefore was not his landlord, would not make such a person a cultivating tenant within the meaning of the Act so as to enable him to apply for restoration to possession under section 4 (5) of the Act when his possession is disturbed by the legal owner of the land.

Petition under section 115 of Act V of 1908 and section 6-B of Madras Act XXV of 1955 praying the High Court to revise the order of the Court of the Assistant Collector, Cheranmahadevi, dated 5th January, 1957 and made in T.P.No. 161 of 1956.

T. R. Ramachandran, for Petitioner.

S. Mohan Kumaramanglam and *K. V. Sankaran,* for Respondent.

The Court delivered the following

JUDGMENT.—This is an application under section 6-B of Madras Act XXV of 1955 to revise the order of the Revenue Divisional Officer, Cheranmahadevi, dated 5th January, 1957.

It was common ground that the petitioner was the owner of the two items of land in question, measuring in all Ac. 1-35. The petitioner's case before the Revenue Divisional Officer was that these lands were in the possession of the petitioner' wife. She was merely a trespasser. The petitioner filed O.S. No. 134 of 1955 against his wife for recovery of possession of the lands. He obtained a decree, and in execution of that decree he obtained delivery of possession of the lands on 20th July, 1956.

On 3rd November, 1956, the respondent, who was the husband of the sister of the petitioner's wife, applied to the Revenue Divisional Officer under section 4 (5) of the Act and prayed for restoration of possession. The respondent alleged that he had been dispossessed by the petitioner on 30th October, 1956.

* C.R.P. No. 301 of 1957. 5th August, 1957.

The Revenue Divisional Officer held an enquiry and passed an order, dated 5th January, 1957, directing that the respondent should be restored to possession of these two items of lands.

What the Revenue Divisional Officer had to decide was whether on the evidence on record the respondent was a cultivating tenant as defined by the Act. All that the respondent alleged in his application was that he executed a rent deed to the petitioner's wife. There was no allegation that the petitioner's wife, as lessor or otherwise, came within the definition of "landlord" in section 2 (e) of the Act. The Revenue Divisional Officer no doubt found that the respondent's case, that he had been cultivating the lands before the petitioner obtained delivery of possession, was true. But the Revenue Divisional Officer failed to consider and he certainly failed to decide who was the "landlord" and whether the respondent was a cultivating tenant. If there was only an agreement between the petitioner's wife and the respondent, and the petitioner's wife was not the landlord within the meaning of section 2 (e) of the Act, the question would arise whether the respondent was a cultivating tenant at all as defined by the Act. It was not disputed that the lands belonged to the petitioner. His title to the lands as against his wife was also established in O.S. No. 134 of 1955. The respondent never pleaded or proved any agreement, express or implied, as between him and the petitioner. In such circumstances he could not claim to be a cultivating tenant who held directly under the petitioner. If the landlord was the petitioner, and on that basis the respondent could not be the cultivating tenant, and if the petitioner's wife was not the landlord, any agreement with her would not make the respondent a cultivating tenant. The Revenue Divisional Officer had to consider, as I said and decide whether the respondent was a cultivating tenant, and that question was not considered or decided. That vitiates the order of the Revenue Divisional Officer.

I set aside the order of the Revenue Divisional Officer and remand the case for disposal afresh, after giving an opportunity to both sides to place such further evidence as is available to them.

I find that the petitioner was also remiss in not placing before the Revenue Divisional Officer a copy of the judgment. Learned counsel for the petitioner stated that a copy of the delivery receipt was filed but even that was not marked as an exhibit. The petitioner's claim was that he took possession on 20th July, 1956, in execution of the decree. The respondent's case, as he put it forward, was that the dispossession was on 30th October, 1956. The question of dispossession would arise only if it is established that the respondent was a cultivating tenant. If that position is established, the Revenue Divisional Officer would have to go into the question, whether the respondent was dispossessed and if so on what date.

The petition is allowed. No order as to costs. The proceedings are remanded to the Revenue Divisional Officer for disposal afresh according to law.

R.M. — *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE PANCHAPAKESA AYYAR AND MR. JUSTICE BASHEER AHMED SAYEED.

K. M. P. R. Kumarappa Chettiar and another .. *Appellants**

v.

P. R. A. S. Andiappa Chettiar (*died*) and others .. *Respondents.*

Madras Agriculturists Relief Act (IV of 1938)—Debt already scaled down under the Pudukottai Agriculturists Relief Regulation before merger—Application for scaling down under Act of IV of 1938 after merger—Whether can be made.

A debt scaled down under the Pudukottai Agriculturists Relief Regulation before the merger of that State with the Madras State can further be scaled down after the merger under the provisions of the Madras Agriculturists Relief Act IV of 1938.

* A.A.O. No. 232 of 1954. 17th January, 1958.

The fact that an agriculturist obtains a double benefit, because of two statutes favouring him will not be a ground for presuming against his right to the second benefit and the Court has necessarily to carry out the law as it stands.

Visvanatha Pandaram v. *Savarimuthu Udayar*, (1956) 1 M.L.J. (Notes of Recent Cases) 65, followed.

Appeal against the order of the Court of the Subordinate Judge, Pudukottai, dated 11th November, 1953 and made in E.A. No. 1306 of 1953 in E.P. No. 560 of 1952 in O.S. No. 902 of 1942.

T. R. Srinivasan, for Appellants.

T. R. Ramachandran and *T. K. Subba Rao*, for Respondents.

The Judgment of the Court was delivered by

Panchapakesa Ayyar, J.—This is an appeal by one Kumarappa Chettiar and another the decree-holders in O.S. No. 902 of 1942 on the file of the Chief Court, Pudukottai, in E.A. No. 1306 of 1953, in E.P. No. 560 of 1952. That E. A. was an application under section 20 of the Madras Agriculturists Relief Act by the respondent judgment-debtor, Andiappa Chettiar, for staying the execution proceedings until his application under section 19 of the Madras Act IV of 1938, which had already been filed, was disposed of. The properties were being brought to sale for the decree amount as scaled down under the Pudukottai Agriculturists Relief Regulation (before the merger of that State with the Madras State). The appellants had contended that, as the judgment-debtor had got his debt scaled down under the Pudukottai Agriculturists Relief Regulation, he could not again claim a further scaling down of his decree debt under the Madras Agriculturists Relief Act and get a *double benefit*. The lower Court overruled this contention, relying on the ruling in *Alagappa Chettiar* v. *Nachiappa Chettiar*[1]. Hence this appeal. We have perused the records and heard learned counsel on both sides. Mr. Visvanathan, learned counsel for the appellants, urged that the ruling in *Alagappa Chettiar* v. *Nachiappa Chettiar*[1], might not apply strictly to a case like this, and might be distinguished, but, on the learned counsel for the respondents Mr. T. R. Ramachandran, pointing out to him the ruling of one of us in C.M.S. A. No. 52 of 1954, *Visvanatha Pandaram* v. *Savarimuthu Udayar*[2], covering the very same point, he had to admit that his contention might not hold good in view of this later ruling. We agree. The fact that an agriculturist obtains a double benefit, because of two statutes favouring him, will not be a ground for presuming against his right to the second benefit as the policy of the Legislature in recent times has been to confer more and more benefits on him, and the Court has necessarily to carry out the law as it stands unless it is proved to be *ultra vires* and it cannot rectify any alleged injustice caused by any valid legislative enactments. This Civil Miscellaneous Appeal deserves to be and is hereby dismissed, but in the circumstances, without costs.

V.S. ——— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE RAMASWAMI.

Karuppiah Pillai .. *Appellant**

v.

K. R. Pichai Pillai and others .. *Respondents.*

Civil Procedure Code (V of 1908), Order 20, rule 16—Suit by principal against agent for accounts—Allegation that the account-books had been handed over by the agent to the principal who had suppressed and not produced them—If entails dismissal of suit—Proper course to adopt.

Limitation Act (IX of 1908), section 13—Applicability—Cause of action arising outside India—Period of absence of the defendant—Whether can be excluded in computing limitation.

A suit for accounts by the principal against his agent should not be dismissed on the basis of an allegation that the agent has handed over all the account-books and that the principal has not produced them. The fact that the principal was in possession of the account-books and is withholding

1. (1953) 2 M.L.J. 298 : I.L.R. (1953) Mad. 996.

2. (1956) 1 M.L.J. (N.R.C.) 65.

* A. No. 564 of 1954. 27th March, 1957.

them cannot absolve the agent of his liability to account. The proper course to adopt would be to pass a preliminary decree directing that an account should be taken. In rendering accounts it may be open to the agent to prove his allegations and the court may draw the proper inference on such proof.

The suit cannot also be dismissed on the ground that the plaint does not contain a detailed statement of accounts. It is only after the preliminary decree for accounts has been passed that the statement of charges would be filed by the plaintiff and the defendant would have an opportunity of meeting them.

B. C. Chakravarthy v. *Kiran Chandra Rai*, (1925) I.L.R. 52 Cal. 766 as explained by an unreported judgment of Varadachariar and Burn, JJ., in A.S. No. 299 of 1932, referred.

Section 13 of the Limitation Act would apply to suits based on a cause of action which arose out of India. It is open to the plaintiff to exclude the period when the defendant was outside India in computing the period of limitation.

Muthukanni Mudaliar v. *Andappa Pillai*, (1954) 2 M.L.J. 731: I.L.R. (1955) Mad. 116 (F.B.), referred.

Appeal against the decree of the Court of the Subordinate Judge of Sivaganga in O.S. No. 30 of 1951.

K. S. Desikan and *K. Raman*, for Appellant.

A. Sundaram Aiyar and *S. Gopalarathnam*, for Respondents.

The Court delivered the following

JUDGMENT.—This appeal is directed against the preliminary judgment and decree of the Subordinate Judge of Sivaganga in a suit for accounts, O. S. No. 30 of 1951.

The facts are:—The plaintiff Karuppiah Pillai was conducting a money-lending firm at Kuala Lumpur (Malaya) under the name and style of PR. K. KR. It has been managed by agents appointed by him under the terms and conditions obtaining amongst the Nattukottai Chettiars. The first defendant who is a close relation of the plaintiff was sent to Kuala Lumpur as the agent of the plaintiff, since his son Narayana Pillai was coming back to India. The conditions of service under which the first defendant was appointed as agent have been set out in paragraph 4 of the plaint. In accordance with the practice prevailing in those parts the first defendant executed a salary chit to the plaintiff on 24th November, 1939 and left for Kuala Lumpur on 7th January, 1940 and reached there on 22nd January, 1940. The plaintiff's son executed a power-of-attorney to the first defendant for managing the concern. Sometime later the second world war broke out and Kuala Lumpur was taken over by the Japanese. It was under Japanese occupation from December, 1941 to May, 1945. There was no communication between Kuala Lumpur and India. After communications were restored, the first defendant was sending kurippu copies occasionally and also balance sheets to the plaintiff,from which the plaintiff says it was not possible for him to know about the real state of affairs. On account of the various reasons the first defendant was directed to hand over charge to one Kannuswamy who was the agent of the plaintiff's brother's firm at Kuala Lumpur. The first defendant handed over charge to him in or about January, 1947 and returned to India on 23rd August, 1947. The defendant, then according to the plaintiff, did not turn up or hand over the accounts to him. Then the first defendant is again stated to have set out for Kuala Lumpur on his own business on 8th May, 1948 and came back only in February, 1951. The plaintiff states that he made repeated demands from the first defendant to render accounts and finally sent a notice on 12th January, 1951, which was returned. Then he has filed the suit for the rendition of accounts from 7th January, 1940, to 23rd August, 1947.

The case for the first defendant was entirely different. His case is that prior to Japanese occupation he was duly sending to the plaintiff kurippu copies. The Japanese occupation lasted from the beginning of 1942 and continued till September 1945. The accounts for the period and also those relating to the subsequent period after the British reoccupation have been sent to the plaintiff from time to time. Then

after he returned to India on 23rd August, 1947, he went to the plaintiff's house and handed over to him records relating to the handing over of the charge to Kannuswami Pillai. According to the first defendant he has rendered a complete and true account of his agency from the time he took over charge upto the time he handed over charge to Kannuswami. In fact the first defendant wants to make out that in the bargain he lost all his arrears of salary because this was set off against the profits of the grocery business which according to the first defendant the plaintiff forewent.

The learned Subordinate Judge dismissed the suit on two grounds, *viz.*, limitation and on the ground that he who seeks equity must do equity and that in as much as the first defendant has done his part of the bargain and plaintiff has deliberately suppressed the accounts, the latter cannot be given any equitable relief of rendition of accounts on the foot of agency.

The point of limitation which weighed with the lower Court was this. It was held in *Venkatachallam Chetty* v. *Narayanan Chetty*[1], and *Subramaniam Chettiar* v. *Maruthamuthu*[2], that when the cause of action arose out of India the benefit of section 13 of the Indian Limitation Act cannot be availed of by a plaintiff. But in *Muthukanni Mudaliar* v. *Andappa Pillai*[3], it has been held that a suit for personal relief against a defendant can be instituted in a Court within the local limits of whose jurisdiction the defendant is residing or carrying on business on the date of the institution of the suit, wherever the cause of action for the suit had arisen. To such a suit the provisions of the Statute of Limitation in force in the country of the forum, that is, the *lex fori* would apply; and that section 13 of the Indian Limitation Act would apply to cases where the suit is instituted in India even though the cause of action might have arisen outside India, that is, also for suits based on a cause of action which arose out of India. *Rathina Thevan* v. *Pakkirisami Thevan*[4], and *Subramaniam Chettiar* v. *Maruthamuthu*[2], relied upon by the lower Court were overruled. Therefore, the case cannot be dismissed on the ground of limitation as has been done by the learned Subordinate Judge; and it was open to the plaintiff to exclude the period when the defendant was outside India in computing the period of limitation.

The second point relates to the allegations and the counter allegations which have been set out above. It will be noticed that the case of the plaintiff is that kurippu copies were sent to him irregularly and that they did not give him a true picture of what the defendant owed him in the shape of accounting for the agency. On the other hand the case for the defendant was that he had been regular and comprehensive in the matter of sending accounts though as a matter of fact when he returned to India he gave this plaintiff all the account books, etc.,and that nothing further can be had from him. The learned Subordinate Judge came to the conclusion that the plaintiff has not filed all the records in the shape of kurippus, etc., which have been handed over to him by the first defendant. In fact, the documents which have been filed in the Court are the correspondence, Exhibits A-2 and A-7, the Aynthugai Exhibits A-8 and A-9 and the correspondence Exhibits A-12 to A-17 and the kurippu copies Exhibits A-18 to A-22, and the correspondence Exhibit B-1 to B-4 and the lawyer notices that were exchanged were Exhibits A-10 and A-11.

On account of the fact that both parties filed a joint memo. on 4th February, 1954, to the effect that they were not letting in any oral evidence at that stage and that issues 1, 5 and 7 were not pressed by the defendants and that issues 2, 2-a 2-b 4, 6, and 9 may be considered by the Commissioner who may be appointed if a preliminary decree is passed in that suit, issues 3, 3-a and 8 alone have to be considered. At the stage of the preliminary enquiry the learned Subordinate Judge had not the beneft of any evidence except this documentary evidence mentioned by me above and on that material he had to assess whether all the account books, etc., sent by the first defendant have reached the plaintiff.

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1. (1914) 28 M.L.J. 140.
2. (1944) 1 M.L.J. 440.
3. (1954) 2 M.L.J. 731 (F.B.).
4. (1929) 28 L.W. 645.

The learned Subordinate Judge on this material came to the conclusion that plaintiff has suppressed some of the accounts, etc., handed over to him by the first defendant and on that conclusion, he deduced that the suit was bound to fail on the following argument put forward by the first defendant. The defendant relied upon the decision in *Upendra Kishore Chowdhury* v. *Ramtara Debya Choudhurani*[1], where it was laid down that plaintiff who is in possession of the accounts and other papers cannot be allowed to sue the defendant for accounts unless and until he produces them into Court with a statement of what they contain and showing what the balance is. The decision is based on the principle that a person seeking equity must do equity. It has been further held in that case that when an account is to be taken between the parties, the first essential requisite to be satisfied is that the person who is in possession of the accounts should produce all of them into Court. In *B. C. Chakravarthy* v. *Kiran Chandra Rai*[2], the principle of the decision in *U. K. Rai Chowdhury* v. *Ramtara Debya Choudhurani*[1], had been followed. In *Shiva Prasad* v. *Hanuman Bux*[3], and *Badrinath Upadhya* v. *Kesho Kumar*[4], the principle in *B. C. Chakravarthy* v. *Kiran Chandra Rai*[2], has been upheld.

On the foot of these decisions the learned Subordinate Judge came to the conclusion that the conduct of the parties as disclosed by the correspondence that passed between them unmistakably goes to show that the entire accounts and the documents must have been handed over by the first defendant to the plaintiff either at the time he actually gave over the charge or after he returned to India personally.

This is the finding which is assailed before me on two grounds, namely that as a matter of fact it was not correct and secondly even in assuming that the plaintiff was guilty of suppressing certain documents it would not entail the dismissal of the suit.

So far as the first point is concerned, I am in entire agreement with the learned advocate, Mr. Desikan, that at that stage there was nothing on record for the learned Subordinate Judge to be so emphatic and comprehensive. All that we can assume at this stage is that all the accounts which are said to have been handed over by the first defendant to the plaintiff are not forthcoming. In a case of that nature, it is not open to the Court to dismiss the suit, because as has been pointed out in *Shankar Lal* v. *Tosgan Pal*[5], where the liability of the defendant's agent to render accounts arose on the facts admitted in the pleadings, a preliminary decree should be passed directing that an account be taken from the defendants. In rendering accounts it is open to the defendants to establish their allegation that certain material account-books or papers are in possession of the plaintiff who has deliberately withheld them. If their allegation is proved the Court will doubtless draw proper inference from the conduct of the plaintiff. The fact that the plaintiff was in possession of certain documents and was withholding them cannot absolve them of their liability to render accounts for the business. The decision in *Ram Dass* v. *Bagwat Dass*[6], was relied upon. In that case it was held that law does not impose a duty upon a plaintiff who calls on his agents to account first to satisfy that there is or ought to have been some surplus in the hands of his agents. It is a duty for the Court to fix a date for furnishing of the accounts and it is for the defendant to prove the amount of his receipts.

Turning to the second point, *B. C. Chakravarthy* v. *Kiran Chandra Rai*[2], has been explained in a judgment of this Court. It is held in an unreported judgment in A.S. No. 299 of 1932 by Varadachariar and Burn, JJ., as follows:

"Lastly the respondents' learned counsel contended that the plaintiff, who is now in possession of the account-books and who has from time to time received fortnightly kurippu copies as usual among Chettiars and has thus had abundant information about the transaction carried on by the defendant has not even in the plaint alleged what it is that he complains of in the transactions of the defendant, and even his evidence as to demands that he made for an explanation from the defendant is very vague

1. (1909) 13 Cal. W.N. 696.
2. (1925) I.L.R. 52 Cal. 766.
3. A.I.R. 1938 Pat. 392.
4. A.I.R. 1940 Pat. 114.
5. A.I.R. 1934 All. 553.
6. (1904) 1 All. L.J. 347.

and unreliable. He points to the fact that the suit was filed just at the end of the third year after the defendant left the plaintiff's service and contends in such circumstances the Court ought to hold that the plaintiff had no cause of action at all. In support of this contention he relies upon certain observations in *Bharat Chandra Chakravarty* v. *Kiran Chandra Rai*[1], repeated in *Nalini Kumar Chakaravarty* v. *Gadahar Choudhury*[2]. These cases no doubt lay down that the machinery of the Court ought not to be employed merely for the purpose of examining accounts without some basis laid for the suit for an account, but they were not cases in which the defendant denied the existence of an accountable relationship. On the other hand, the cases in *B. C. Chakravarty* v. *Kiran Chandra Rai*[1], recognises that the question of the existence of liability to account is for the Court to decide and as the defendant has in this case denied the existence of such liability, it is difficult to hold that the plaintiff had no cause of action for his suit. It is not the practice in this presidency when a principal is suing his agent for accounts to state in the plaint itself, objections to various items in the account. When the preliminary decree for accounts is passed, the plaintiff will in the ordinary course be called upon to file his statement of charges and the defendant will have an opportunity of meeting them. It is no objection to the maintainability of the suit therefore that the plaint does not itself contain a detailed statement of the charges ".

The net result of this analysis is that the fact that plaintiff has probably suppressed certain records, kurippus, etc., handed over to him by the first defendant is not a ground for dismissing the suit but only to have the matter investigated in the enquiry in the final decree stage. The Commissioner will at that stage naturally go into the question before fixing any liability upon this first defendant as to what were the accounts, etc., that were supplied by him to the plaintiff and the liability if any that has been proved as against the first defendant. If accounts are proved to have been handed over by the first defendant to the plaintiff and the latter is deliberately withholding them, then his case would be at an end, that is his demand for rendition of accounts will be at an end and the Commissioner will have to send a blank report that he cannot assess the liability of the first defendant *vis-a-vis* the plaintiff.

This is not the stage for canvassing the adequacy and reliability of the information that might be supplied to the Commissioner for assessing the accounts.

The decree and judgment of the lower Court are set aside, and a preliminary decree directing the first defendant to render a true and proper account for his agency of the plaintiff firm from 7th January, 1940, till 23rd August, 1947, is passed, and the taking of accounts is relegated to the final decree stage. Costs to abide the result. Both parties will be at liberty to place all materials before the lower Court and Commissioner in regard to what is alleged to have been handed over and what is alleged to be withheld.

V.S. — *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE SOMASUNDARAM.

N. Santhanam Iyer *alias* Santhanarama Iyer .. *Petitioner**

v.

Somasundara Vanniar .. *Respondent.*

Madras Cultivating Tenants Protection Act (*XXIV of* 1956), *section* 9 (2)—*Appeal under*—' *Every decision of a Rent Court* '—*If includes decisions on interlocutory applications as well.*

A right of appeal from the decision of a Court or Tribunal is not an inherent right but is one expressly conferred by the Statute. The right of appeal conferred by section 9 (2) of the Madras Cultivating Tenants Protection Act should be construed in the light of the foregoing sub-section, *viz.*, section 9 (1) of the Act. That is, only decisions falling within the scope of section 9 (1) will be appealable under section 9 (2) and decisions on ancillary applications in the main petition for the purposes mentioned under section 9 (1) of the Act are not decisions that are appealable under section 9 (2) of the Act. The expression ' every decision ' in section 9 (2) of the Act could refer only to the final decision in regard to the rights of parties with reference to the dispute under section 9 (1) and does not include orders passed on Interlocutory Applications, (like an order refusing to admit a counter).

1. (1925) I.L.R. 52 Cal. 766.
2. (1931) 49 C.L.J. 245.

* C.R.P. No. 1343 of 1957. 4th March, 1958.

Petition under section 115 of Act V of 1908 praying the High Court to revise the Order of the Court of the Rent Tribunal and District Munsiff of Valangiman at Kumbakonam, dated 27th September, 1957 and made in F.R.C.M.A. No. 36 of 1957(F.R. No. 438 of 1957, Rent Court, Kumbakonam).

G. R. Jagadisan, for Petitioner.

S. Mohan Kumaramangalam and *K. V. Sankaran*, for Respondent.

The Court delivered the following

JUDGMENT.—This is a revision filed by the landlord against an order passed by the Rent Tribunal and District Munsif in F.R.C.M.A. No. 36 of 1957 on his file. The respondent herein filed an application before the Rent Controller for fixation of fair rent. It was numbered as F.R. No. 438 of 1957. The petitioner herein filed a counter on 22nd May, 1957, in which he admitted the respondent to be a tenant and pleaded an agreement for higher rent. When the petition came on for hearing on 29th May, 1957, it was dismissed for non-appearance. The suit was then restored and renumbered as F.R. No. 457 of 1957, and it was posted to some date in June, 1957. The case was adjourned at the request of both the parties to 9th July, 1957. On 9th July, 1957, the respondent herein was examined as P.W. 1. The trial was adjourned to 30th July, 1957. On 30th July, 1957, P.Ws. 2 and 3 were examined, and the respondent is said to have closed his case. Then the petitioner herein filed an additional counter dated 9th July, 1957. In the meantime one Natesa filed F.R. No. 498 of 1957 dated 29th May, 1957 before the same Rent Controller in respect of the same lands for fixation of fair rent. In that the present petitioner and Natesa compromised. An order in terms of compromise was passed. The trial Court refused to receive the additional counter filed on 30th July, 1957, the additional counter being dated 9th July, 1957, and stated that that counter was presented long after the two witnesses were examined and that that counter could not be considered as amendment of pleadings, as in that counter the contents of the earlier counter were totally denied. The trial Court further observed that in the original counter filed by the respondent herein it was admitted by the respondent that the petitioner herein was a cultivating tenant whereas in the present additional counter it was denied. The trial Court, therefore, treated this as a fresh counter and refused to admit the same in the present case.

Against the said order of refusal to admit the second counter filed on 30th July, 1957 an appeal was preferred before the District Munsiff, who was the Rent Tribunal Officer. Before the lower appellate Court a preliminary objection was taken that no appeal lies against the order of the trial Court refusing to receive the counter. The preliminary objection was upheld and the appeal was dismissed. It is against this order of the lower appellate Court which dismissed the appeal summarily on the ground that no appeal lies the present revision has been filed.

The only point for decision in this revision is whether the expression "From every decision of a Rent Court, an appeal shall, within such time as may be prescribed, lie to the Rent Tribunal" found in sub-clause (2) of section 9 of Madras Act XXIV of 1956 includes an order refusing to accept the petition as in this case. In short, the question is whether every decision of a Rent Court means and includes decisions on interlocutory applications as well.

There is no definition of the expression 'decision' in the Act. In *Tassaduq Rasul Khan* v. *Kashi Ram*[1], the expression 'decision' in section 596 of the Code of Civil Procedure which is equivalent to section 110 of the present Code, came up for consideration before their Lordships of the Privy Council. In that case the appellate Court confirmed the decree and judgment of the trial Court, but for reasons different from those given by the trial Court. Nevertheless it gave leave to appeal to the Privy Council under section 110. A preliminary objection was taken before the

1. (1902) L.R. 30 I.A. 35 : I.L.R. 25 All. 109.

Privy Council that the leave granted was irregular, as it was not in accordance with the provisions of section 110. The contention was that decision means the reason given by the Court for the decree. In short it was contended as equivalent to judgment. Their Lordships of the Privy Council held as follows :—

"They think that the natural, obvious and *prima facie* meaning of the word 'decision' is a decision of the suit by the Court, and that that meaning should be given to it in the section ".

According to the decision in the above case 'decision' is not equivalent to judgment in the Civil Procedure Code. In *Tuljaram Row* v. *Alagappa Chettiar*[1], the question that came up for consideration was as to whether an order refusing to raise an additional issue would be a judgment within the meaning of that expression in clause 15 of the Letters Patent Act. A Full Bench of this Court held that no appeal lay, meaning thereby that it was not a judgment.

The expression used in this Act is not 'judgment' but 'decision.' It is fairly conceded by Mr. Jagadisa Ayyar appearing for the petitioner that clause (2) must be read with reference to clause (1), that is to say, every decision of a Rent Controller must be in connection with an application to the Rent Court for fixation of fair rent or for deciding any dispute arising under this Act, the only two classes of cases which are referred to in clause (1) of section 9. The question is whether the decision is on an application made to the Court for fixation of fair rent or for deciding a dispute under the Act or any application inclusive of all ancillary applications filed in that application for decision to the Rent Court for one of the two objects mentioned therein.

It is well-known that unless a right of appeal is provided by statute there is no inherent right of appeal by any party in any matter which comes up for judicial adjudication before any Tribunal constituted under the Act. Should, therefore, the expression 'decision' be considered as one giving a right of appeal against all orders passed in or on an application to the Rent Court for one of the two objects mentioned in clause (1)? Stress is laid upon the expression 'every decision'. After giving my careful and anxious consideration to this question it seems to me that the expression 'every decision' used in clause (2) refers only to the final determination of the rights of parties in the two classes of cases mentioned in clause (1). I do not think that, however wide the interpretation of the expression 'every decision' may be, that will include any order passed on an interlocutory application. It seems to me that it has reference only to the final determination of the rights of parties on the applications made before the Rent Controller either for fixation of fair rent or for deciding any dispute arising under this Act. In this view it seems to me that the appellate Court was justified in holding that no appeal lies against an order, and therefore this revision petition fails.

In view of the fact that the question is not altogether free from difficulty I hold that the petition should be dismissed without costs to the other side.

R.M. ——— *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE RAJAGOPALAN.

Swaminatha Odayar and others .. *Petitioners**

v.

Raja Muhammad Rowther .. *Respondent.*

Civil Procedure Code (V of 1908), Order 21, rule 100 and section 115—Application for redelivery of property taken in execution—Delay in—Good faith—Inconsistent stand taken by the applicant—If could be excused—Interference by High Court in revision in respect of discretionary orders of lower Court—Scope of.

It is true that the delay in filing or re-presenting an application under Order 21, rule 100, Civil Procedure Code, for re-delivery of possession of property taken in execution, can be excused when the applicant has been pursuing in good faith other remedies. But where an applicant under Order 21,

1. (1910) 21 M.L.J. 1 : I.L.R. 35 Mad. 1 (F.B.).

* C.R.P. No. 143 of 1957. 18th April, 1957.

rule 100, Civil Procedure Code, which assumes that he is out of possession, has been claiming that he is in possession in proceedings under section 145, Criminal Procedure Code, the two stands are inconsistent and it cannot be said that the delay in filing his claim is *bona fide*, especially when he has been keeping one Court ignorant of his attitude in the other Court.

Though the High Court will be reluctant to interfere in revision where the decision of the question at issue really depends upon the exercise of the discretion vested in the lower Court, still when the discretion is exercised on an erroneous assumption, for which there is no basis at all, the order is liable to be set aside in revision.

*Petition under section 115 of Act V of 1908 praying the High Court to revise the Order of the District Court of West Tanjore, at Tanjore, dated 24th December, 1956 and made in E.A. No. 23 of 1956 in E.A. No. 38 of 1955 in E.P. No. 24 of 1937 in O.S. No. 3 of 1919.

R. Viswanathan and *T. S. Venkatarama Ayyar*, for Petitioners.

S. V. Venugopalachari, for Respondent.

The Court delivered the following

JUDGMENT.—In proceedings in execution of the decree, O.S. No. 3 of 1919, to which the respondent was not a party, there was an order for delivery of possession of the properties, and possession was delivered to the petitioners on 12th June, 1955. The respondent preferred an application on 11th July, 1955 to the District Court, W. Tanjore, under the provision of Order 21, rule 100, Civil Procedure Code, for re-delivery of the properties. This application was eventually numbered as E.A. No 19 of 1957, and it will be more convenient to refer to that application by that number E.A. No. 19 of 1957.

When E.A. No. 19 of 1957 was presented to the District Court on 11th July, 1955, it was ordered on 19th July, 1955 to be returned for the rectification of certain defects. The defects pointed out were:

"(1) cause-title is incorrect; and (2) since E.A. No. 42 of 1955, put in by the petitioner has been dismissed on 13th July, 1955, it should be stated how this application is maintainable. Authority, if any, to be stated".

The respondent was allowed ten days within which to remedy these defects. On 29th July, 1955, E.A. No 19 of 1957 was re-presented without rectifiying these defects, and the respondent asked for time within which to comply with the requisition of the District Court. Further time was granted on 1st August, 1955. But again, on 11th August, 1955, the respondent filed an application asking for more time. Three weeks further time was granted on 12th August, 1955. On 2nd September, 1955, the respondent applied for yet more time which was granted by the order dated 3rd September, 1955. The respondent wanted more time and finally on 26th September, 1955, the District Judge ordered three weeks' further time granted as a last chance.

To comply with the order of the District Court, E.A. No. 19 of 1957 should have been re-presented within three weeks of 26th September, 1955, after rectifying the defects that had been pointed out on 19th July, 1955. The respondent did not re-present the petition till 16th February, 1956, when he applied in E.A. No. 23 of 1956 to condone the delay in the re-presentation of E.A. No. 19 of 1957.

The petitioners lodged their objection in a counter-affidavit filed in E.A. No. 23 of 1956. But the learned Judge passed an order dated 24th December, 1956 that the delay be condoned. It is the correctness of that order that the petitioners challenge by this application to revise the order of the learned District Judge.

Learned counsel for the petitioners did not deny that the learned District Judge had jurisdiction to excuse the delay. The contention was that the discretion vested in the learned District Judge had been exercised on such erroneous grounds that it justified interference in revision by this Court.

The contention of the respondent was that the delivery effected on 12th June, 1955 was a symbolical delivery and that he continued all along in possession. He filed E.A. No. 42 of 1955 requesting the Court not to record delivery, but that appli-

cation was dismissed. That was referred to in that endorsement of the District Judge on E.A. No 19 of 1957, on 19th July, 1955. What the respondent wanted in E.A. No. 19 of 1957 was re-delivery of possession, which would only be on the footing that he was out of possession from 12th June, 1955.

Independently of the proceedings in the civil Court in E.A. No. 42 of 1955 and E. A. No. 19 of 1957, proceedings went on in criminal Courts, first under section 144 and later under section 145, Criminal Procedure Code. The position taken by the respondent in the proceedings under section 145, Criminal Procedure Code was that the respondent continued in uninterrupted possession of the land, and he prayed that that possession should be maintained. The proceedings under section 145, Criminal Procedure Code were disposed of by the Magistrate on 28th October, 1955. The respondent's claim to remain in possession was upheld by the learned Magistrate. The petitioners moved the High Court to revise the orders of the Magistrate, and by its order dated 9th February, 1956, this Court set aside the order of the Magistrate dated 28th October, 1955, passed in M.C. No. 2 of 1955. It was after the examination of the proceedings under section 145, Criminal Procedure Code, with the order of this Court dated 9th February, 1956 that the respondent re-presented E.A. No. 19 of 1957 to the District Court on 16th February, 1956, with, as I said, E.A. No. 23 of 1956 to excuse the delay.

The learned District Judge upheld the contention of the respondent:

"It is clear from the above proceedings that the applicant (*i.e.*, the respondent) would have *bona fide* believed that there was no need to re-present the execution application till the order passed in M.C. No. 2 of 1955 was reversed by the High Court on 9th February, 1956. The circumstances of the case do not show that the delay in re-presenting the execution application was either deliberate or wanton. It, therefore, seems to me that there was sufficient cause for delay in re-presenting the execution application and that this is a fit case in which the delay should be condoned."

It is rather difficult to accept the findings that failure to re-present E.A. No. 19 of 1957 within three weeks of 26th September, 1955 was not deliberate, and that the respondent acted in good faith. That the respondent did not re-present E.A. No. 19 of 1957 within the time allowed by the Court did not admit of any doubt. From what I have referred to already, it should be clear that at that time proceedings under section 145, Criminal Procedure Code, were pending before the Magistrate, and on the respondent's own showing he waited for the termination of these proceedings before deciding to pursue all the remedies he thought were open to him in E.A. No. 19 of 1957. There was certainly enough to show that the respondent elected not to re-present E.A. No. 19 of 1957, and the ground on which he made that election was that proceedings were pending under section 145, Criminal Procedure Code. It should be remembered that the basis of the application No. 19 of 1957 was that he was not in possession while the basis of his claim in proceedings under section 145, Criminal Procedure Code was quite the reverse, that he was in possession. Learned counsel for the petitioners was right when he pointed out that, if E.A. No. 19 of 1957 had been presented in time and numbered, and notice thereof had been given to the petitioners, they would have been in a position to put the respondent's own averments as evidence in proceedings under section 145, Criminal Procedure Code that the respondent was not in possession, and urge that the representations to the Magistrate to the contrary should not be accepted.

The defects in E.A. No. 19 of 1957 which the respondent had to remedy were only two, and they were fairly simple in scope. In the applications the respondent made from time to time for extension of time within which to remedy the defects no reference was made to the pendency of the proceedings under section 145, Criminal Procedure Code. The plea put forward at that stage was that the relevant papers were not available, to the respondent and that they were with counsel at Madras. It was only in the affidavit filed in E.A. No. 23 of 1956 that the respondent put forward the specific plea, that it was because of the pendency of the proceedings under section 145, Criminal Procedure Code, culminating with the order of the High Court on 9th February, 1956, that the respondent re-presented E.A. No 19 of 1957 and he pleaded that he refrained from re-presenting the papers in good faith because he

was pursuing diligently remedies open to him under section 145, Criminal Procedure Code.

It is rather difficult to agree with the learned District Judge that the respondent established good faith right through. What had to be examined was whether the respondent was actuated by good faith at the time he had to re-present E.A.No. 19 of 1957, which was within three weeks of 26th September, 1955. At that time the proceedings under section 145, Criminal Procedure Code, had not been disposed of. The fact that those proceedings were pending and the further fact that in these proceedings the respondent was taking up the position, that he was in actual physical possession of the lands, were not brought to the notice of the learned District Judge. They were brought to the notice of the learned District Judge only in the affidavit when E.A. No. 19 of 1957 was re-presented on 16th February, 1956.

I have already referred to the possibility of the effect of the affidavit in E.A. No. 19 of 1957 with the basis that the respondent required re-delivery of the land, if that affidavit had been made available to the petitioners for the proceedings under section 145, Criminal Procedure Code. *Per contra* if the proceedings under section 145, Criminal Procedure Code and the basis of the respondent's claim thereunder had been brought to the notice of the District Court in E.A. No. 19 of 1957, that the respondent continued to be in possession, the petitioners as respondents, would have been in a position to point out to the District Court that no question of re-delivery as such under Order 21, rule 100, Civil Procedure Code, could apply to a person who claimed that he was still in physical possession of the lands, despite delivery under orders of Court on 12th June, 1955.

If the learned District Judge had considered how mutually inconsistent were the stands taken by the respondent in the proceedings in E.A. No.19 of 1957 and in the proceedings under section 145, Criminal Procedure Code, whether the learned District Judge would have come to the conclusion, that the respondent acted right through in good faith is extremely doubtful. Learned counsel for the respondent urged that the unfortunate position of the respondent was that he had to take inconsistent positions; one that he was out of possession with reference to the proceedings in the civil Court, because he wanted to avail himself of the opportunity of filing an application under Order 21, rule 100, and the other that he was in possession, which was the basis he put forward in proceedings under section 145, Criminal Procedure Code. I am not for a moment saying anything whether the respondent was entitled to take up such inconsistent pleas or whether he was bound to do so by circumstances beyond his control. All I am now concerned with is whether the plea of good faith put forward by the respondent and accepted by the learned District Judge had any real basis at all. That basis was lacking because at no time prior to 16th February, 1956, did the respondent come forward with the truth in asking the District Court virtually for permission not o proceed with the proceedings in E.A No. 19 of 1957. That the respondent sought to achieve by the simple expedient of not re-presenting the papers, because if the papers had been presented in time after rectifying the two defects pointed out by the Court, the petition would have been numbered and the petitioners would have had notice of those proceedings.

Learned counsel for the respondent contended that even if it was a case of erroneous exercise of discretion by the learned District Judge, this Court could not interfere at this stage, because the enquiry into E.A. No. 19 of 1957 is almost completed and orders are awaited. The question is, was the learned District Judge justified in coming to the conclusion that the respondent acted in good faith. If that basis for the plea of good faith failed, there was no basis for excusing the delay in the re-presentation of the papers. What I have said above is sufficient to show that there was really no material on record on which the learned District Judge could have come to the conclusion, that the respondent acted in good faith. Reluctant though this Court should be to interfere in revision where the decision of this question at issue really depended upon the exercise of the discretion vested in the

lower Court, this would appear to be a case where that discretion was exercised on an erroneous assumption, for which there was no real basis at all, that the respondent acted in good faith. The petition is allowed with costs. The order of the learned District Judge in E.A. No. 23 of 1956 is set aside.

R.M. ——— *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE PANCHAPAKESA AYYAR.

Jagannatha Iyengar (*died*) and another .. *Petitioners**

v.

S. P. Mariappan Chettiar .. *Respondent.*

Evidence Act (I of 1872), section 116—Estoppel—Lessor and lessee—Usufructuary mortgage under which lessor was in possession declared invalid—Notice by true owner to lessor and lessee—Plea of estoppel—Whether would enure after such notice.

Where the lessor and the lessee received notice from the true owner that the usufructuary mortgage under which the lessor was in possession had been declared invalid by a Court, the plea of estoppel under section 116 of the Evidence Act would not enure after such notice.

But the lessee would be liable to pay the rent to the lessor till they receive the notice from the true owner.

Petition under section 115 of Act V of 1908 praying the High Court to revise the Decree of the Court of the Additional Subordinate Judge of Ramanathapuram at Madurai in A.S. No. 97 of 1951 preferred against the Decree of the Court of the District Munsif of Srivilliputtur in O.S. No. 107 of 1950.

A. Srirangachariar, for Petitioners.

R. Desikan, for Respondent.

The Court delivered the following

JUDGMENT.—This is a petition by one Jagannatha Ayyangar, since deceased, the plaintiff in O.S. No. 107 of 1950 on the file of the District Munsif's Court, Srivilliputtur, for revising and setting aside the judgment and decree of the Additional Subordinate Judge of Ramanathapuram at Madurai in A.S. No. 97 of 1951.

The facts are briefly these : The petitioner had filed O.S. No. 107 of 1950, originally as a Small Cause suit, for recovery from the respondent Mariappa Chettiar a sum of Rs. 227-12-3 as arrears of rent due to him for a shop rented out to the respondent on a rent of Rs. 5 per month. That shop had been usufructuarily mortgaged to the petitioner by the Jeer of the Manavala Mamuni Mutt of Srivilliputtur for a period of five years from 23rd May, 1941, for a sum of Rs. 550, without, however, obtaining the sanction, under section 76 of he Madras Hindu Religious Endowments Act. On that ground. the usufructuary mortgage in favour of the petitioner was held to be void, on 31st March, 1945, by the sub-Court of Ramanathapuram at Madurai (Exhibit B-1), and this was confirmed by this Court on 6th October, 1950, in A.S. No. 544 of 1945 (Exhibit B-2). On 9th August, 1945 notice was given to both the petitioner and the respondent by the Mutt stating that the Mutt continued to be entitled to the mortgaged property and asking the petitioner to surrender the *othi* and the respondent to surrender his tenancy rights. The respondent was afraid that he would be evicted from the shop and, being a businesslike Chettiar, he wanted to continue in the shop and attorned to the Mutt on or about 12th August, 1945. The petitioner did not reply to the Mutt's notice, and kept quiet, obviously because he had no valid reply and was awaiting the decision of this Court in the pending appeal, in the forlorn hope that this Court might upset the first Court's decision. No such thing happened. As already stated, the first Court's decision was confirmed by this Court, and the *othi* was held to be void, on 6th October, 1950. In spite of this perfectly correct legal position, the petitioner felt highly aggrieved. that he had parted with Rs. 550 of his to the Mutt in the belief that the *othi* was

* C.R.P. No. 1262 of 1953. 7th February, 1958.

valid and was now faced with the loss of his money. He did not succeed in making the Hindu Religious Endowments Board ratify the *othi*. He filed this suit against the respondent on the ground that the respondent having accepted the lease from him and treated him as landlord, was estopped from denying his title till he had surrendered possession of the shop to him, or till he was actually evicted therefrom in due course of law by the rightful owner, the Mutt, or was deemed to have been so evicted. The trial Court upheld the plea of estoppel to the full extent, and decreed the suit in full. I may add here that the suit, though filed originally as a Small Cause Suit, was converted into an original suit owing to complicated questions of title regarding this shop being involved in it. The respondent took the matter in appeal, and the learned Subordinate Judge reversed the judgment and decree of the trial Court, holding that the decision regarding the voidness of the *othi* was binding on the petitioner, who was a co-defendant along with the Manavala Mamuni Mutt, as there was a conflict between the pleas of the defendants and it was necessary to resolve the conflict. The curious thing is that the trial Court decreed the suit in full, and the lower appellate Court dismissed the suit in full, whereas the correct course lay between these two extremes. During the pendency of this Civil Revision Petition, the petitioner died, and his legal representative has been brought on record.

I have perused the records, and heard the learned counsel on both sides. Mr. Srirangachariar, learned counsel for the petitioner and Mr. Desikan learned counsel for the respondent, have argued the case fairly and squarely. Mr. Srirangachariar did not any longer contend that the petitioner's *othi* would be valid and could be enforced. Mr Desikan fairly conceded that till the respondent received the notice, on 12th August, 1945, he had not taken advantage of the judgment dated 31st March, 1945, holding the *othi* to be invalid, and given notice to the petitioner that he felt himself bound by that judgment, though under appeal, and would pay the rent only to the Mutt, the rightful owner. Indeed, till he received the notice on 12th August, 1945 he was happy, as he need not pay the rent either to the true owner or to the othidar whose othi had failed.

Three questions arise for decision in this Civil Revision Petition. The first is whether the petitioner, who admittedly lost his title under the *othi*, could claim the rent from the respondent, simply relying on the estoppel under section 116, Indian Evidence Act, for the whole suit period. The second is whether he could not claim at least the rent for six months, from 12th February, 1945, till 12th August, 1945, or Rs. 30, from the respondent, since neither he nor the respondent had received any notice from the true owner till then, and both had gone on the basis of the lease between them, and were awaiting the result of the appeal pending in this Court. The third is whether the respondent was bound to actually surrender possession to the petitioner even after the notice of the true owner to the petitioner, which the petitioner dared not answer, and after the true owner was threatening him with eviction in case he did not attorn to him. I am of opinion that *till* 12th August, 1945, the respondent was bound to pay the rent to the petitioner, who had given the lease to him, as he had not received any notice from the true owner, and had not also surrendered his possession to the petitioner fearing that his title would not hold good after the judgment of the trial Court dated 31st March, 1945, and had, of course, not been evicted. Mr. Desikan had no valid contention to urge against this. So, the suit should have been decreed against the respondent for this sum of Rs. 30.

But I cannot agree with Mr. Srirangachariar, for the petitioner, that the estoppel under section 116 of the Evidence Act would enure even after the petitioner and the respondent had both got the notices from the true owner, and the petitioner had not dared to reply to that notice, and the respondent was threatened with eviction by the true owner unless he attorned to him. A lea e by an unauthorised person, of properties over which he has no title, to another will not entitle him to receive the rent stipulated under the lease for all time to come. If that were so, impostors will begin executing leases over public and private properties, over-

which they have not the least claim or title, and rely on section 116 of the Evidence Act which will become a snare and a trap, instead of a shield and a defence, to honest persons as it is intended to be. I am satisfied that the respondent really feared eviction by the true owner if he did not attorn to him after he had received the notice on 12th August, 1945. Mr. Srirangachariar argued that the respondent did not give notice to the petitioner about the notice he had received, and take his instructions, and ask him to take appropriate steps against eviction by the true owner. This argument would have had some force if the petitioner himself had not received a notice from the true owner at the same time. The respondent was doubtless aware that the petitioner had also received such a notice from the true owner and was keeping quiet as he had nothing to urge and was only hoping for a reversal of the trial Court's judgment by this Court. So there was no purpose served by the respondent's going to the petitioner and asking his advice or directions. The petitioner was taking no action while the true owner was threatening eviction unless the respondent attorned to him. A real threat of eviction believed in by the respondent would be enough justification for the respondent's attornment, and will make it not a voluntary act on his part but an act necessitated by the exigencies of circumstances.

In the end, therefore, I modify the judgments and decrees of both the Courts below, and grant the second petitioner in this Civil Revision Petition, the legal representative of the original plaintiff, a decree for Rs. 30 against the respondent with interest thereon at six per cent per annum from 26th August, 1949, the date of plaint, till realisation, and dismiss the rest of the suit claim. In the peculiar circumstances, I direct all the parties to bear their own costs throughout.

V.S. ——— *Order modified.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE PANCHAPAKESA AYYAR.

Muthuswami Naicker and others .. *Petitioners**

v.

Ramalinga Naicker .. *Respondent.*

Civil Procedure Code (V of 1908), section 144 and Order 41, rule 6—Scope of—Restitution under Order 41, rule 6—If means the same as in section 144—Security in cases of restitution under section 144—Court if bound to order.

The word 'restitution' in Order 41, rule 6, Civil Procedure Code, has no reference to restitution proper referred to in section 144, Civil Procedure Code. Order 41, rule 6, contemplates cases where a decree-holder seeks to draw out moneys deposited by the other party to avert execution. In such cases, when an appeal is pending, suitable terms may be imposed, such as furnishing security, etc., for such withdrawal. It is quite a different matter where a party is only seeking to draw out his own money deposited by the other side by way of restitution under section 144, Civil Procedure Code. In such cases the Court is not bound to order security for the withdrawal of monies due to a party in restitution proceedings merely because the other side has filed an appeal. Each case has to be decided on its own merits.

Petition under section 115 of Act V of 1908 praying the High Court to revise the Order of the Court of the Subordinate Judge of Madurai, dated 10th July, 1957 and made in E.A. No. 389 of 1957 in E.P. No. 403 of 1956 in O.S. No. 93 of 1950.

T. S. Vaidyanatha Ayyar, for Petitioners.

S. Ramachandra Ayyar and *V. S. Ramakrishnan*, for Respondent.

The Court delivered the following

JUDGMENT.—This is a petition for revising and setting aside the order of the Subordinate Judge of Madurai dismissing E.A. No. 389 of 1957 in E.P. No. 403 of 1956 in O.S. No. 93 of 1950 on his file. That was a petition put in by these petitioners, under section 151, Civil Procedure Code alone, for directing the respondent, Ramalinga Naicker, to give sufficient immovable property, security before drawing

* C.R.P. No. 825 of 1957. 30th August, 1957.

out the amount of Rs. 2,000 deposited by them into Court as a first instalment by way of restitution of the amount of some Rs. 7989·54 in all due to the respondent by virtue of the first Court decree against him in O.S. No. 93 of 1950, Sub-Court, Madurai, having been set aside by this Court in appeal (A.S. No. 480 of 1952). The petitioner's case was that they had filed L.P.A. No. 41 of 1956 in this Court against the judgment and decree in A.S. No. 480 of 1952, and that, though the stay application in that L.P.A. had been dismissed by a Bench of this Court, to which I too was a party, the respondent who was alleged to be a man of no means, should be made to give immovable property security for the Rs. 2,000 put into Court before he drew it out. It is represented to me by Mr. T. S. Vaidyanatha Ayyar that the balance of Rs. 5,989.54 has also been since deposited into the trial Court under an order of Ramaswami, J., dated 29th July, 1957, in a C.M.P. in this Civil Revision Petition as a condition precedent to stay of execution.

I have perused the records and heard the learned counsel for both sides. Mr. Vaidyanatha Ayyar strongly relies on the wording of Order 41, rule 6 (1), Civil Procedure Code and says that the Court *shall* order security as a condition precedent to the withdrawal of even moneys in restitution as the word "restitution" is found in that rule. Mr. Ramachandra Ayyar, learned counsel for the respondent, pointed out that the petition itself was filed only under section 151, Civil Procedure Code, and not under Order 41, rule 6, Civil Procedure Code. I do not consider this an impediment in the way of Mr. Vaidyanatha Iyer's relying on Order 41, rule 6, Civil Procedure Code, if it will help him. In modern times, the mere fact that a section of law rightly applicable to a matter is not quoted, and another section of law not so clearly applicable to the matter is quoted, will not bar the party from relying on the right section of law, if it is not totally irrelevant, or unconnected with the previous section. After all it is the Courts which lay down the law and are supposed to be the reservoirs of law and not parties who file petitions. But the difficulty facing Mr. Vaidyanatha Ayyar is that Order 41, rule 6, Civil Procedure Code, will also not help him in the circumstances of this case, which is a case of *restitution* under section 144, Civil Procedu e Code. Section 144, Civil Procedure Code, says that where and in so far as a decree is varied or reversed, the Court of the first instance *shall*, on the application of any party entitled to any benefit by way of restitution or otherwise, cause such restitution to be made, as will, so far as may be, place the parties in the position which they would have occupied but for such decree or such part thereof as has been varied or reversed, and that for this purpose, the Court may make any orders, including orders for the refund of costs and for the payment of interest, damages, compensation and mesne profits, which are properly consequential on such variation or reversal. It need hardly be pointed out that there is a tremendous difference between drawing out the money of another party put into Court for averting a sale in execution or a decree passed in one's favour, and one's own money put back into Court by the other party after the wrong decree in his favour has been reversed in appeal. The word "restitution" in Order 41, rule 6, Civil Procedure Code, relied on by Mr. Vaidyanatha Ayyar occurring in the clause "require security to be taken for the *restitution* of any property which may be or has been taken in execution of the decree" has no reference at all to the restitution proper in section 144, Civil Procedure Code. It means that when a party in whose favour a decree has been passed wants to take the money deposited by the other party to avert a sale in execution of that decree, when an appeal is pending, suitable terms may be imposed on such withdrawal. The thing is quite different when a party is only trying, as in this case, to draw out one's own amounts put in by the other side, by way of restitution. Mr. Vaidyanatha Ayyar urged that the money cannot be termed to be respondent's money, as under the the first Court's decree, which has been set aside, the money was the petitioner's. The argument is unconvincing. No decree of a trial Court has any existence in law when it has been set aside in appeal, any more than a conviction of a trial Court when it has been set aside in appeal and an acquittal has been recorded by the appellate Court. When only restitution is prayed for, in other words, it is only a question of getting back one's own moneys put into Court because of a wrong decree,

the question of the solvency of the person who wanted to draw it out is not very relevant. He was the person who put the money into Court and he had every right to draw it out when the decree which compelled him to put into Court has been set aside and restitution ordered and the money put back into Court by the party wrongly drawing it out. Simply because an L.P.A. has been filed by the petitioners, and there is said to be a chance of their succeeding in that appeal, it is no reason to dep ive the respondent of his right to take his money in the meanwhile. It is not proved that the respondent is such a down-and-out pauper, as was stated by the petitioners, or that he will sell away the rest of his properties. But as stated above, even if he is a pauper, he will be entitled to draw back *his own moneys*, by way of restitution, without security. There is no decree of any kind against him now, and no attachment or other order binding the money. So under the law he will be entitled to draw it out without security. The rulings relied on by Mr. Vaidyana ha Ayyar, namely, *Dhirendra Nath* v. *Sailaj Kumar*[1], and *Rukmani* v. *Subramania*[2], have no relevancy to the facts of this case and will not apply here. Each case has to be decided on its own merits.

Mr. Vaidyanatha Ayyar lastly urged that the petitioners are prepared to pay interest to the respondent for the period the money lies in Court on his failure to furnish security. But that will mean *a forced loan* of the money by the respondent to the petitioners, which no Court in this country has yet the power to order. Nor can I see why a man, who need not give any security for drawing out his own moneys, should be forced to lend the moneys out to his opponent, who got a wrong decree, subsequently set aside in appeal, though there is an L.P.A. pending. It must be noticed also that in the L.P.A. stay was refused by the Bench to the petitioners. It is not as if any valuable properties of the petitioners are *awaiting sale now*, and valuable properties may be sold for a song. The entire money due to the respondent by way of restitution has been deposited into Court. So the only question now is whether the respondent ought to furnish security for drawing out his own moneys, and that question must unhesitatingly be answered, in the circumstances, in the negative and in favour of the respondent and against the petitioners.

This Civil Revision Petition deserves to be and is hereby dismissed with costs.

R.M. ——— *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—JUSTICE BALAKRISHNA AYYAR.

R. Subramania Odayar .. *Petitioner**

v.

Board of Revenue by Commissioner of Land Revenue, Commercial Taxes, Prohibition and Transport, Madras and another .. *Respondents.*

Madras Cinemas Regulation Act (*IX of* 1955), *Rules under, Rule* 109 (1)—*Applicability and construction—Madras Places of Public Resort Act* (*II of* 1888), *section* 7—*Licence issued under—Issue of fresh licence within three months, if barred—" Site "—Meaning of—Erroneous construction by Board of Revenue—Interference by writ of* certiorari *when decision is correct—Rule—Constitution of India* (1950), *Article* 226—*Jurisdiction of High Court—Rule* 4 *of the Rules under Cinemas Act—If binds High Court.*

Rule 109 (1) of the Rules framed under the Madras Cinemas Regulation Act IX of 1955, applies only to a licence granted under that Act. A licence granted under the Madras Places of Public Resort Act (1888) is not a licence the renewal of which without a break is prohibited by rule 109 (1). It may be that in substance a licence issued under the Act of 1888 is just the same as one issued under the Madras Cinemas Regulation Act, but it cannot be said that it is a licence to which rule 109 (1) framed under the Cinemas Regulation Act in terms applies.

The word " site " can properly be used to describe either the exact extent of land occupied by a building, such as a shop in a bazaar, or the larger area of which such extent forms part, *e.g.*, a factory, the site of a college or the site of a hostel. In the latter case the word " site " can properly include

1. A.I.R. 1940 Cal. 582.
2. (1940) 1 M.L.J. 367 : I.L.R. (1940) Mad. 420.

* W.P. No. 967 of 1957. 12th February, 1958.

not merely the actual extent of land on which the building stands, but also the ground surrounding it. In what sense the word is used would depend upon the context. The word "site" in rule 109 (1) of the Rules framed under the Cinemas Regulation Act has to be construed in relation to the word licence, and the rule therefore means that when a licence has been granted for a specified extent of land, a licence for it cannot be granted again except after an interval of three months laid down in the rule. It makes no difference whether the land for which the licence was first granted comprises only a part of a survey field or several survey fields. Where the prior licence covers a number of survey fields or sub-divisions of survey fields, the prohibition created by the rule cannot be evaded by shifting the cinema-shed to another survey field or sub-division in the area covered by the earlier licence. It cannot be said that because the sub-divisions are different the sites too are different.

Blaskill v. *Chambers*, (1884) L.R. 14 Q.B.D. 479, referred to.

Where a particular field is open as between two applicants, the Board of Revenue is entitled to make a selection between them, and where it is not shown that in making the selection the Board has been influenced by considerations extraneous to the statute, the decision cannot be interfered with by the High Court by a writ of *certiorari* under Article 226 of the Constitution. The fact that the construction put by the Board upon a rule is erroneous would be no ground for interference when the decision made by it is right in law.

Semble : Rule 4 of the Rules framed under the Madras Cinemas Regulation Act making the decision of the Government on the question of interpretation of the rules under the Act final cannot bind the High Court when it exercises its powers under Article 226 of the Constitution.

Petition under Article 226 of the Constitution of India, praying that in the circumstances stated therein, and in the affidavit filed therewith the High Court will be pleased to issue a writ of *certiorari* calling for the records relating to the order of the Commissioner of Land Revenue, Commercial Taxes, Prohibition and Transport, representing Board of Revenue Madras, dated 9th November, 1957, and made in B.P. Rt. No. 6269 and quash the said order.

S. Mohan Kumaramangalam, for Petitioner.

The Additional Government Pleader (*K. Veeraswamy*) for 1st respondent.

R. M. Seshadri and *S. Baskaran*, for 2nd Respondent.

The Court made the following

ORDER.—On 20th February, 1956, the Additional District Magistrate of Tiruchirapalli issued a licence under section 7 of the Places of Public Resort Act, 1888 to the Manager of the Kala Touring Talkies, permitting him to put up a temporary cinema-shed on S.F. Nos. 310/1, 310/2 and 245/1 of Melakalkandar Kottai Village, hamlet of Alathur. In April 1957, the Collector of Tiruchirapalli issued what is described as a 'no-objection' certificate to the proprietor of the same talkies in respect of S.F. No. 310/1 of Alathur Village. This meant that subject to the other requirements of the statute in that behalf being satisfied a temporary cinema could be constructed and run in S.F. No. 310/1 of Alathur village. In June, 1957, the Collector granted a similar 'no-objection' certificate to the proprietor of the Vani Touring Talkies in respect of a survey field which is two furlongs away from S.F. No. 310/1. One of the rules framed under the Madras Cinemas Regulation Act prohibits the grant of a license to run a touring cinema if it should be situated within four furlongs of another to which a license has already been granted. Since 'no-objection' certificates had been granted to two sites within about two furlongs of each other, the Collector had to decide to whom he would give what is called the C Form license, that is to say the license actually permitting exhibition of films. He decided to give the license to Vani Touring Talikes. The Kala Touring Talkies thereupon appealed to the Board and by an order it made on 9th November, 1957, the Board set aside the order of the Collector and directed the issue of a license to the Kala Touring Talkies. The proprietor of the Vani Touring Talkies has filed the present writ petition calling in question the order passed by the Board.

Rule 109 (1) of the rules framed under the Madras Cinemas Regulation Act read as follows :

"No building constructed of inflammable materials shall be licensed to exhibit shows in any place for a period longer than one year. There shall be an interval of three months before the same site is again licensed."

The Collector understood the word 'site' occurring in the second sentence of this paragraph as referring to the entire area in respect of which a license had been granted. He, therefore, thought that the Kala Touring Talkies could not be given the C Form license for the same place since, to do so would have been to contravene this rule which requires an interval of three months. The Board, however, took the view that the word 'site' occurring in this rule applies only to the actual extent of land occupied by the cinema-shed and that, therefore, if the cinema shed were shifted to another survey field even though that field was coverred by an earlier license, the prohibition laid down in the rule would not be attracted.

The word 'site' has various meanings. In the Shorter Oxford English Dictionary the following meanings have been given to the word 'site':

"(1) The place or position occupied by some specified thing, frequently implying original or fixed position............Place, position, situation .... (2) The situation or position of a place, town, building, etc. The ground or area upon which a building, town, etc., has been built, or which is set apart for some purpose. Also, a plot, or number of plots, of land intended or suitable for building".

In Stroud it is mentioned:

"The term 'site', in relation to a house, building, or other erection, shall mean the whole space to be occupied by such house, building, or other erection, between the level of the bottom of the foundations and the level of the *base* of the walls.—(Metropolis Management Act, 1878 (41 and 42 Vict., C. 32, S. 14). That definition provided for Part II of the Metropolis Management Act, 1878, (Sup.) was applied to a bye-law made by the Metropolitan Board of Works: *Blashill* v. *Chambers*.[1] A like definition is provided for Public Health (Ireland Act) 1878 (41 and 42 Vict., C. 52) S. 41".

The word 'site' can be properly used to describe either the exact extent of land occupied by a building or a larger area of which such extent forms a part. For example, when we speak of the site of a shop in a bazaar, it would ordinarily be only the site actually occupied by the building proper. But when we speak of the site of a factory or the site of a college or the site of a hostel, the word can properly include not merely the actual extent of land on which the building stands but also the grounds surrounding it. In what sense the word is used would depend upon the context. Now, it will be noticed that in the second sentence of rule 109 (1) the expression used is 'there shall be an interval of three months before the same *site* is again licensed.' The word 'site' in that sentence is used in relation to the word license and must be construed in relation to that word. This means that when a license has been granted for a specified extent of land a license for it cannot be granted again except after an interval of three months. It makes no difference whether the land for which the license was first granted comprises only a part of a survey field or whether it comprises several survey fields. Where the prior license covers a number of survey fields or sub-divisions of survey fields, the prohibition created by this rule cannot be evaded by shifting the cinema-shed to another survey field or sub-division in the area covered by the earlier license. The argument that since the sub-divisions are different the sites are different will not avail. The construction put upon the word 'site' by the Board appears to me to be clearly wrong.

Rule 4 of the rules framed under the Madras Cinema Regulation Act runs as follows:

"If any question arises as to the interpretation of these rules otherwise than in connection with the prosecution for an offence, the question shall be referred to the Government whose decision thereon shall be final".

There was some argument as to the scope and extent of operation of this rule. Into that matter, I do not consider it necessary to go now since it is very clear to me that that the rule cannot bind this Court when it exercises its powers under Article 226 of the Constitution.

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1. (1884) L.R. 14 Q.B.D. 479.

Though the construction put upon the word 'site' by the Board is erroneous, it was, however, right in thinking that there was no legal bar to the grant of a C Form license for the location of a cinema-shed in S.F. No. 310/1, because the license which had been issued in 1956 was not a license granted under the Madras Cinemas Regulation Act. That license had been granted under the Places of Public Resort Act and, therefore, it is not a license the renewal of which without a break is prohibited by rule 109 (1).

Mr. Mohan Kumaramangalam argued that though the previous license was under the Places of Public Resort Act, it was, if we look into the substance of the matter, just the same as a license issued under the Cinemas Regulation Act. There is some point in this. But at the same time since it cannot be said that this is a license to which rule 109 (1) in terms applies, we cannot say that the previous license was one issued under this Act. This means that the field was open as between the Kala Touring Talkies and the Vani Touring Talkies and the Board was entitled to make a selection between them. It has not been shown that in making its selection the Board was influenced by considerations extraneous to the statute. That being so, its order cannot be interfered with. The petition is dismissed, but in the circumstances of the case without costs.

P.R.N. — *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. P. RAJAGOPALAN, *Officiating Chief Justice* AND MR. JUSTICE RAMACHANDRA AYYAR.

Venkatasubbaraya Ayyar *alias* Papier and others .. *Appellants**

v.

State of Madras and another .. *Respondents.*

Madras Estates (Abolition and Conversion into Ryotwari) Act (XXVI of 1948), section 23 (a) (ii)—Applicability, scope and effect—Estate village—Thirishvekam grant—Allowance paid by adjusting share of allowance of holder to rent payable by him on holdings in estate—Village subsequently brought under Madras Act (XXVI of 1948)—Effect—Liability for rent—Determination—Claim based on old contract—Substainability—Right to claim adjustment of allowance towards rent—" Rent "—Madras Estates Land Act (I of 1908), section 3 (ii).

Where in the case of a village which was an estate village, the mode of payment of Thirishvekam allowance to the holders of the Thirishvekam grant was by adjusting what was payable to each of the sharers of the grant to what was payable by him as rent on the holdings in the estate, the permanent patta under which such adjustment was permissible was enforceable so long as the village was an estate village. Once the rights and liabilities of the grantees fall to be governed by the provisions of the Madras Estates (Abolition and Conversion into Ryotwari) Act 1948, the liability to pay rent on the holdings in the possession of the holders of the grant has to be determined under section 23 (a) (ii) of that Act. Section 23 (a) (ii) of the Act which alone governs the liability of the holders of the grant furnishes no basis for a claim based either on the old contract between the holders and the grantees or upon any claim independent of that, that what is payable to them as Thirishvekam should be adjusted towards the rent payable under the terms of that section.

The expression " rent " has to be construed with reference to the definition in the Estates Land Act, 1908, "rent for the use of the land held for the purposes of agriculture."

(1957) 2 M.L.J. 162, affirmed.

Appeal under Clause 15 of the Letters Patent against the Order of the Hon'ble Mr. Justice Rajagopala Ayyangar, dated 19th November, 1956† and made in the exercise of the Special Original Jurisdiction of the High Court in W.P. No. 986 of 1955, presented under Article 226 of the Constitution of India to issue a Writ of *Certiorari* calling for the records from the Collector of Salem in L. Dis. 357-39/55, dated 26th November, 1955, and quash the order of attachment of the standing crop in the petitioner's lands on pattas Nos. 4, 7, 9 and 11, in Papanaickenpatti Village, Dharmapuri Taluk, Salem District.

P. S. Ramachandran, for Appellants.

The Additional Government Pleader (*K. Veeraswami*) for Respondents.

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*Writ Appeal No. 48 of 1957. 13th February, 1958.

† (1957) 2 M.L.J. 162.

The Judgment of the Court was delivered by

Rajagopalan, O.C.J.—We are in entire agreement with the reasoning and the conclusions of Rajagopala Ayyangar, J. That the appellants were entitled to the Thirishvekam grant was never in dispute. It was also common ground that the mode of payment of the Thirishvekam allowance, to which the appellants and their predecessors-in-title were entitled, was by adjusting what was payable to each of the sharers of the Thirishvekam grant to what was payable by him as rent on the holdings he held in the estate. The Thirishvekam grant was one-sixth of the beriz of the village of Papanaickenpatti. So long as Papanaickenpatti was an estate village, the permanent patta, under which this adjustment was permissible with reference to the holding of each of the appellants, was enforceable and it was so enforced, *e.g.*, A.S. No. 26 of 1911 on the file of the District Court, Salem. But now the rights and liabilities of the appellants in relation to Papanaickenpatti, which was one of the villages in the estate, are governed by the provisions of the Estates Abolition Act. The liability to pay rent on the holdings in the possession of the appellants has to be determined under section 23 (*a*) (ii) of that Act. As Rajagopala Ayyangar, J., pointed out, the expression "rent" has to be construed with reference to the definition in the Estates Land Act "rent for the use of the land held for the purpose of agriculture." We agree with the learned Judge that section 23 (*a*) (ii), which alone governs the liability of the appellants, furnishes no basis for a claim, either based on the old contract between the landholder and the appellants or upon any claim indepencent of that, that what is payable to them as Thirishvekam should be adjusted towards the rent payable under the terms of section 23 (*a*) (ii) of the Act.

The appeal fails and is dismissed. There will, however, be no order as to costs.

The learned counsel for the appellants desires us to point out that the rights of the appellants as persons entitled to the Thirishvekam inam can in no way be affected by the determination of their liability to pay rent which, as we pointed out, is governed only by the terms of section 23 (*a*) (ii) of the Act.

P.R.N. ——— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE BALAKRISHNA AYYAR.

M. T. Viswanathan Chettiar by Power of Agent Balasubramania Iyer .. *Petitioner**

v.

Munian Samban and others .. *Respondents.*

Madras Cultivating Tenants (Payment of Fair Rent) Act (XXIV of 1956), sections 4, 5, 6 and 7—Applicability and scope of—Application for division of produce—Maintainability before fixation of fair rent—Waram agreement for payment of 60 per cent. of gross produce executed before Act—If becomes totally void on coming into force of Act—Right of landlord to claim 40 per cent. in kind until fixation of fair rent.

It cannot be held that section 7 of the Madras Cultivating Tenants (Payment of Fair Rent) Act, 1956, would come into operation only after the fair rent had been fixed. To so hold would mean that till the fair rent is fixed—and the process might take considerable time—the tenants could remove the entire crop and the landlord would be without any visible remedy.

Where a cultivating tenant had executed waram chits in favour of his landlord undertaking to pay rent at 60 per cent. of the gross produce, it cannot be held that so far as the tenant is concerned, the agreement entered into by him becomes totally unenforceable on the coming into force of Act XXIV of 1956. Only those portions of the agreement which are repugnant to the Act would be superseded by the Act ; in other respects the agreement would prevail with the result that the landlord would be entitled to have his rent paid in kind. Until the fair rent under the Act is fixed, the landlord would be entitled to 40 per cent. of the gross produce, instead of the 60 per cent. agreed to in the waram chit, on the basis of the presumption that contract voluntarily entered into between the parties is a fair and reasonable one, though by reason of section 4 of the Act, the proportion of 60 per cent. has to be altered into 40 per cent. It may also be presumed that a given year would be a normal year in the absence of proof of exceptional circumstances, and that the crop obtained in that a year is a normal crop.

*C.R.P. Nos. 1437, 1438, 1439 and 1440 of 1957. 8th January, 1958.

Petition under section 11 of the Madras Act XXIV of 1956 praying the High Court to revise the order of the Court of the District Munsif of Sirkali (Rent Tribunal, Sirkali) dated 31st August, 1957 and made in R.T.A. Nos. 1, 2, 3 and 4 of 1957 (P. Nos. 343, 339, 340 and 341 of 1957, Rent Court, Mayuram).

G. R. Jagadisan and *T. S. Srinivasan*, for Petitioner.

S. Mohan Kumaramangalam and *K. V. Sankaran*, for Respondents.

The Court delivered the following

JUDGMENT.—It is convenient to deal with all these four Civil Revision Petitions together. The petitioner is a landlord and the respondents are his tenants. In February, 1953, they executed waram chits in his favour undertaking to pay rent at 60 per cent. of the gross produce. Year after year the crop was being divided on the ground at this rate. After Madras Act XXIV of 1956 came into force the respondents repudiated the provisions of the waram agreements they had entered into and wanted to convert their engagements into leases. They sent to the petitioner draft lease-deeds unilaterally fixing the rent at a certain rate. Not unntuarally the petitioner refused to accept their proposals. Subsequently in 1957 the respondents harvested the crops and, according to the petitioner, removed them without notifying him. There is no doubt that they did not share the crop on the thrashing floor. The petitioner thereupon filed four petitions before the Rent Court under section 6 of Madras Act XXIV of 1956. He asked for three reliefs. One was for division of the produce between himself and the respondents. The other was for assessing and fixing the amount of paddy due to him. And the third was for directing the respondents to deliver the paddy so fixed.

Before the Rent Court the petitioner stated that he did not want fixation of fair rent under the Act and that what he wanted was only a division of the produce in the ratio of 40 : 60 which is the ratio fixed by statute. The Rent Court took the view that the petitioner was not entitled to an order directing that he should be given 40 per cent. of the produce of that particular year. According to the Rent Court section 7 of the Act would come into operation only after the fair rent had been fixed under the Act and not before. Since the petitioner had stated that he did not want fixation of fair rent the Rent Court dismissed the petitions.

On appeal the learned District Musnif took the view that so far as the tenants are concerned the agreements they had entered into, became totally unenforceable. He also considered that the petitioner could not ask for 40 per cent. of the gross produce without asking the Court to ascertain the fair rent. In he result, he dismissed the appeals. The petitioner has come to this Court.

In certain respects Act XXIV of 1956 is hard to understand. Ideas have been incorporated in it which have not been fully thought out and the consequences thereof provided for. The rent Court took the view that section 7 would come into operation only after the fair rent had been fixed. There is something to be said for that point of view, but, if it were correct it would mean that till the fair rent is fixed—and the process might take considerable time—the tenants could remove the entire crop and the landlord would be without any visible remedy. Such a result should, if it is possible to do so, be avoided. It is noticed that though section 7 prohibits a tenant from removing any portion of the produce in such a manner as to prevent the due division thereof no penalty appears to be attached for disregard of this provision.

I do not share the view of the learned District Munsif that so far as the tenants are concerned the agreements which they had entered into with the petitioner in 1953 became wholly unenforceable. As I read the Act only those portions of the agreement which are repugnant to the Act would be superseded by it; in other respects the agreements would prevail, which means that the petitioner in the case would be entitled to have his rent paid in kind.

The question that really arises is what is to be done pending the fixation of fair rent under the Act. Normally one may start on the basis that a contract

that the parties have voluntarily entered into is a fair and reasonable one. In this particular case the proportion in favour of the landlord was originally fixed at 60 per cent. By reason of section 4 of the Act that 60 per cent. has to be altered to 40 per cent. One may also presume, unless it appears that there have been exceptional circumstances, that a given year was a normal year. The crop obtained in 1957 may therefore be presumed to be a normal crop and the petitioner is entitled to 40 per cent. of a normal crop.

In the circumstances I would set aside the decision of the courts below and remit the matter back to the Rent Court for determining what the gross produce was which each of the respondents realised from the land in 1957. The respondents were bound to deliver to the petitioner 40 per cent. of the grain in kind. But, owing to lapse of time it is impossible to require them to deliver the grain in kind. All that they can be now required to do is to pay the price of that grain. In determining the date as on which the price of the grain is to be determined it is difficult to avoid a certain amount of arbitrariness, but some date has nevertheless to be fixed. The Rent Court will fix the price as on 1st October, 1956 and 1st February, 1957. The respondents will naturally get credit for the deliveries of grain they have made. The value of the grain so delivered will be as on the date on which the deliveries were made. If the respondents have made any over-payment they will naturally get a refund. The petitioner will get his costs in this Court.

P.R.N. ——— *Petition allowed ; Order set aside.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE RAJAGOPALA AYYANGAR.

M/s. Artisan Press Ltd., (in Liquidation) by its Liquidators R. Natarajan and S. Bupathi .. *Petitioners**

v.

The Income-tax Appellate Tribunal, Calcutta Bench, at Madras and another .. *Respondents.*

Income-tax Act (XI of 1922), section 28—Applicability—Initiation of proceedings for levy of penalty—What amounts to.

To initiate means 'to originate or to take the first step'. A direction by the Income-tax Appellate Tribunal to the office to issue a notice to the assessee to show cause why a penalty under section 28 (1) (*c*) should not be levied is certainly a step in the proceedings for levy of a penalty under the section and the Tribunal will have jurisdiction to continue the proceedings even after the order under section 33 (4) of the Act has been made. The fact that the notice under section 28 (3) was actually dated and despatched at a subsequent date, after the date of the order under section 33 (4), does not affect the validity of the penalty proceedings if they have been 'initiated' at a time when the Tribunal was seized of the assessment proceedings, thus satisfyng the requirements of section 28 (1) of the Act.

Sivagaminatha Mooppanar and Sons v. *Income-tax Officer, II Circle, Mathurai*, (1955) 2 M.L.J. 477, referred.

Petition under Article 226 of the Constitution of India, praying that in the circumstances stated therein and in the affidavit filed therewith the High Court will be pleased to issue a Writ of *Certiorari* calling for the records relating to the order of the 1st Respondent herein, dated 14th October, 1955, in regard to I.T.A. No. 548 of 1955-56 (assessment year 1953-54) on the file of the Income-tax Appellate Tribunal, Calcutta Bench, camp Madras, relating to the Petitioners and quash the said order.

G. R. Jagadesa Ayyar and *T. V. Balakrishnan*, for Petitioners.

C. S. Rama Rao Sahib, Special Counsel for Income-tax, for Respondents.

The Court made the following

ORDER.—Three points have been urged by the learned counsel for the petitioner in support of the challenge to an order of the Income-tax Appellate Tribunal imposing a penalty under section 28 (1) (*c*) of the Income-tax Act impugned in this writ

*W.P. No. 28 of 1956. 19th November, 1957.

petition : (1) that the Appellate Tribunal was *functus officio* on the date when the proceedings for the levy of penalty were initiated ; (2) that there was no identity between the party against whom the penalty was levied and the assessee who submitted the incorrect return in which the correct particulars of income were not disclosed; and (3) that the order of the Tribunal levying the penalty did not satisfy the requirements of a judicial order.

The order impugned was one by the Income-tax Appellate Tribunal which imposed a penalty of Rs. 1000 on the petitioner Messrs. Artisan Press, Limited. The concerned assessment year was 1953-54 and the Company had preferred an appeal to the Income-tax Appellate Tribunal feeling itself aggrieved by the assessment order passed by the Officer and confirmed by the Appellate Assistant Commissioner. The appeal was heard on 6th October, 1955 and the hearing concluded on 7th October, 1955. One of the items of dispute raised before the Tribunal related to a claim by the assessee to deduct certain commissions said to have been paid in computing its total income. This payment had been disallowed by the departmental authorities on legal grounds and the propriety of this disallowance was challenged before the Tribunal. At the hearing of the appeal, however, the members of the Tribunal examined the accounts of the assessee for the purpose of finding out whether the payment had in fact been made. In passing, it may be mentioned, that the payment was said to nave been made to one of the directors of the Company by name Ponnambalam. The Tribunal examined the ledger and finding that the entry in relation to this payment was by way of interpolation, directed the assessee to produce the cash-book and supporting vouchers. All these were produced on 7th October, 1955, on which date, the Tribunal concluded the hearing and completed their order under section 33 (4). In the course of this order the Tribunal recorded :

> "As, in our opinion, the assessee has concealed its income and has deliberately furnished particulars thereof in the return for the assessment year 1953-54 in the manner set out above, a notice under section 28 is issued calling on the assessee to show cause why a penalty under section 28 (1) (*c*) should not be imposed."

The order under section 33(4) which, as stated before, was dated, 7th October, 1955, was despatched to the assessee and was served on him on 13th October, 1955. Meanwhile in pursuance of the direction contained in the paragraph which I have extracted a notice under section 28 (3) was despatched on 10th October, 1955, and was served on the assessee on 10th October, 1955, itself. The assessee (the petitioner here) appeared in answer to the notice and submitted the three objections which I have mentioned in the opening of the judgment to the imposition of the penalty. These were overruled and the Tribunal proceeded to impose the penalty of Rs. 1000. Hence this petition.

It would possibly be convenient to dispose of second and third objections before dealing with the first.

The party who submitted deliberately the incorrect return claiming the payment of commission was the Artisan Press, Limited. The point urged was that as by the date of the penalty proceeding this company had gone into voluntary liquidation there was no identity between it and the party who submitted the incorrect return. This contention is obviously untenable and was properly rejected. A company exists until dissolution and merely because its activities are reduced and its commercial operations cease and its directors cease to manage it, it does not mean that it ceases to exist or that it has become transformed into a new entity. It is still a company, a unit of assessment with its identity unchanged.

The second point urged was that the order imposing the penalty did not disclose that the matter of concealment had been considered by the Tribunal bearing in mind the explanation submitted by the company to the notice calling for the assessee's explanation. This again is wholly without substance because nothing more was urged in the answer than an assertion of the reality of the payment. The fact that the Tribunal had *prima facie* satisfied themselves regarding the concealment before the

notice under section 28 (3) was issued and expressed that satisfaction in their order under section 33 (4) could not be a ground for questioning the legality of the order imposing the penalty because on the scheme of the Act and in the very nature of things the notice to show cause should be preceded by a *prima facie* satisfaction regarding the concealment. If the Tribunal found that no further explanation was offered at the stage of objection than at the stage of the hearing of the appeal when the entire matter was discussed, they could do nothing else than to repeat their previous order and that is what happened in the present case.

The objection as regards the jurisdiction of the Tribunal to pass the order was rested on the terms of section 28 as explained by the decision of this Court in *Sivagaminatha Moopanar & Sons* v. *I.T.O., II Circle, Mathurai*[1]. The passage relied on read :

> "In our opinion the proceedings for the levy of a penalty must be initiated by an authority when such authority was in seisin of the assessment or other proceedings in the course of which it is found that the assessee has brought himself within the mischief of section 28. When once the notice has been issued the jurisdiction of that authority to continue the proceedings is not dependent upon the continuance of other proceedings in the course of which the penalty proceedings came to be initiated."

The point urged was that the order under section 33 (4) was passed on 7th October, 1955, when the assessment proceedings before the Tribunal terminated. The notice under section 28 (3) was dated 10th October, 1955 and on this account it was contended that on the date when this notice was issued the Tribunal had ceased to have jurisdiction to issue the certificate.

The Tribunal rejected this contention by a line of reasoning which I am unable to endorse. They stated that as the order under section 33 (4) was served on the assessee only on 13th October, 1955, the assessment proceedings must be taken to have been continued till that date, and that as the notice under section 28 (3) was served on the assessee on 10th October, 1955, itself the terms of section 28 (1) and the passage in the decision I have extracted earlier were satisfied. This reasoning, however, ignores the fact that the order of the Tribunal under section 33 (4) was effective from the date of its issue and did not depend for its validity or operation on its service on the assessee. The date of service on the assessee though it may be relevant for any proceedings such as those under section 66(1), etc., is wholly irrelevant for the matter under discussion. The accident therefore that the order issued on 10th October, 1955, was served earlier than the order in the appeal, dated 7th October, 1955, cannot be any proper basis for holding that the assessment proceedings before the Tribunal continued till 10th October, 1955, to enable the Tribunal to take proceedings under section 28 on the assessee.

On the facts of the present case, I have reached the conclusion that the penalty proceedings were initiated at a time when the Tribunal was seized of the assessment proceedings. In the first place even in the order under section 33 (4) the Tribunal had made it clear that they were issuing a notice under section 28 (3) to the assessee. The matter did not stop with this, for I find from the records of the Tribunal which have been called for in pursuance of the rule *nisi* issued in this case, that on 7th October, 1955 itself they passed a direction to issue notice to the assessee under section 28 in conformity with their order in appeal. No doubt the office prepared a draft of the notice only on 10th October, 1955, which after being approved by the members of the Tribunal was despatched on the same day. The order in the notes paper, dated 7th October, 1955, was in my judgment, the initiation of the penalty proceedings. "To initiate" means to "originate" or "to take the first step", and even if the paragraph in the order under section 33 (4) which I have extracted is not itself the initiation or the first step in the proceedings, the direction to the office to issue a notice on 7th October, 1955, was certainly such a step. The terms of section 28 (1) were thus satisfied and the order impugned was within the jurisdiction of the Tribunal.

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1. (1955) 2 M.L.J. 477 : 28 I.T.R. 601.

In this view, I have not considered it necessary to deal with the other contentions which Mr. Rama Rao Saheb urged in support of the legality of the impugned order.

The petition fails and is dismissed with costs.

Counsel's fee Rs. 150.

R.M. *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE BALAKRISHNA AYYAR.

Kuppuswamy .. *Petitioner**

v.

N. Ketty Muthu Goundan .. *Respondent.*

Madras District Municipalities Act (V of 1920), sections 44 (2) and 45—Electoral rolls for municipal elections—Power of Government to direct revision—Scope of—Rules for decision of election disputes under—Rule 2—Time for presentation of election petition.

Section 44 (2) of the Madras District Municipalities Act, 1920, as amended in 1950, takes away the power of the State Government to give directions for the preparation and publication of electoral rolls for municipal el ctions which they possessed under the former provision. Under the section as it stands at present only the State Government is to direct the publication of such portions of the electoral roll which relate to the Municipality, out of the electoral roll prepared and revised under the Representation of People Act, 1950. The election authority has no power to add any new names to the list and their only power is to bring the list in accord with the electoral roll prepared for the relevant Assembly Constituency.

The prepositions ' of ' and ' from ' in rule 2 and the proviso respectively of the Rules framed for direction of election disputes under the District Municipalities Act mean the same and the preposition ' of ' is used sometimes equivalent to ' after '. Hence in either case the first day of reckoning the period of seven days fixed under the rule can be excluded.

Petition under Article 227 of the Constitution of India praying the High Court to revise the order of the Court of the Principal Subordinate Judge and Election Commissioner, Coimbatore, dated the 13th day of November, 1957 and made in O.P. No. 472 of 1955.

K. Narayanaswami Mudaliar and *M. Thirugnanasundaram*, for Petitioner.

S. Mohan Kumaramangalam and *K. V. Sankaran*, for Respondent.

The Court delivered the following

JUDGMENT.—In the second week of October, 1955, an election was held to the Municipal Council, Erode, from the 14th ward of that town. The polling took place on 10th October, 1955. The votes were counted on 11th October, 1955, when it was found that Ketty Muthu Goundan had obtained 398 votes while his rival Kuppuswamy had obtained 447 votes. The latter was, therefore, declared duly elected. On 18th October, 1955, the defeated candidate filed an election petition to set aside the election. On 13th November, 1957, the Principal Subordinate Judge and Election Comissioner, Coimbatore, set aside the election and ordered a fresh election to be held; Kuppuswamy has filed this revision petition to set aside the order of the Election Commissioner.

In order to understand the contentions of the parties it is necessary to mention some other facts. Exhibit A-3 is a copy of the electoral roll for the ward and it is dated 20th May, 1955. Between 20th May, 1955 and 11th October, 1955, this roll was revised. P.W. 1, the Deputy Tahsildar, who was assisting the "Electoral Registration Officer" to revise the roll during the period deposed that out of numerous applications for inclusion of names in the elctoral roll 162 were allowed in August and September, 1955. On 22nd August, 1955, the Inspector of Municipal Councils and Local Boards, Madras, wrote Exhibit A-8 to the Municipal Commissioner, Erode, directing him,

" Irrespective of the time of receipt, as and when amendments (to the electoral roll) are received they should be duly published and incorporated in the proper place in the Municipal roll ".

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* C.R.P. No. 1670 of 1957. 21st February, 1958.

On 23rd September, 1955, however, the Government of Madras, issued an order, Exhibit A-10 in which they said,

"The Government hereby cancel the orders in the memorandum referred to above and direct the Municipal Elections Officers (Municipal Commissioners) *forthwith* not to publish under section 44 (2) of the Madras District Municipalities Act, 1920, any amendment to the electoral roll for any territorial constituency of the Madras Legislative Assembly that may be received from the Electoral Registration Officers, until the ensuing elections to Municipal Councils are over".

They also directed the Inspector of Municipal Councils and Local Boards to cancel forthwith his instructions in Exhibit A-8. The Commissioner received a copy of Exhibit A-10 only on 26th September, 1955. But in the meanwhile, *i.e.*, to say on the 23rd itself 84 voters had been added to the list. The Election Commissioner took the view that these 84 persons had been wrongly included and that they were not entitled to vote on 10th October, 1955. As the difference between the votes secured by the competing candidates was only 41 he further held that the result of the election had been materially affected by reason of the mistake committed by the election authority. In the result he passed the order complained of.

Madras Act II of 1947 substituted the following sub-section for the previous provision in section 44 (2) of the Madras District Municipalities Act:

"The executive authority or any person authorised by the election authority in this behalf shall prepare and *publish in such manner* and *at such times* as the Provincial Government may direct, the electoral roll for the municipality or the alterations to such roll."

It will be noticed that this sub-section empowered the Provincial Government to give directions in respect of two matters pertaining to elections; (1) it empowered them to give directions as regards the manner of publication of the electoral rolls, and (2) it also empowered them to give directions about the time-table relating to the preparation and publication of electoral rolls. In 1951, this sub-section was replaced by another one. That runs as follows:

"*As soon as may be* after the electoral rolls for the Assembly constituencies which consist of, or comprise, the municipality or any portion thereof, have been published, revised or amended in pursuance of the Representation of the People Act, 1950, any person authorised by the election authority in this behalf shall publish in such manner as the State Government may *direct*, the portions of the said rolls which relate to the municipality or of the alterations therein, as the electoral roll for the municipality or as alterations to such roll, as the case may be".

This new sub-section deprived the State Government of the power it previously had to give directions relating to the time-table for the preparation and publication of the electoral roll. It confined the power of the State Government to one matter, *viz.*, the manner of publication. This means that when they issued Exhibit A-10 the State Government had no jurisdiction or authority to tell the election authority that it could not include any names.

If the matter had stood there the conclusion would have been that the names that were newly added to the electoral roll had been properly added and that in consequence the election is not liable to be set aside. Mr. Mohan Kumaramangalam, the learned Advocate for the respondent, however, argued that the matter does not stop there at all and that the election authority too had no power to add to the names in Exhibit A-3 in the manner it did. He pointed out that in 1955 when the election which has given rise to the present petition was held the position was this. Under the Representation of People Act, 1950, electoral rolls have to be prepared for all Assembly constituencies. Such rolls have also to be revised in the manner prescribed by the Act and the Rules thereunder. The relevant parts or portions of these rolls formed the electral rolls for the Municipalities and the wards in the Municipalities. The election authority prescribed under the District Municipalities Act cannot embark on any amendments or alterations of the rolls on its own authority. What it has to do is merely to see that the relevant parts or portions of the rolls tally with the electoral roll of Assembly constituencies. That is made clear by section 45 of the District Municipal Act as it was amended in 1950. That section limits the power of the election authority to make amendments in the electoral roll "for the purpose of bringing it into accord with the electoral roll for the relevant Assembly constituency." But that

is not what the election authority tried to do in the present case. As the evidence of P.W. 1 the Deputy Tahsildar shows, between 20th May, 1955 and 11th October, 1955, numerous applications were received and entertained for inclusion of names in the electoral roll for the 14th ward. That was beyond the jurisdiction of the election authority. The persons added to the roll subsequent to the date of Exhibit A-3 were not entitled to vote at all and their number is very much more than the difference between the votes secured by the two candidates. It is impossible to escape the conclusion that the results of the election were affected by this error. To this reasoning of Mr. Mohan Kumaramangalam the learned advocate for the petitioner was unable to find an adequate reply. I must therefore hold that the conclusion of the Election Commissioner is right though for a reason wholly different from those which he assigned.

Mr. Narayanaswami Mudaliar, the learned advocate for the petitioner, raised another point. As mentioned earlier the result of the poll was announced on 11th October, 1955. The election petition was presented on 18th October, 1955. Rule 2 of the Rules for the Decision of Election Disputes under the Madras District Municipalities Act, 1920, runs as follows :—

"2 (1).—The petition shall be presented within seven days *of* the date of the declaration of the result of the election:

Provided that where the result of any election held in pursuance of sub-clause (*i*) of clause (1) of section 177 of the Madras District Municipalities (Amendment) Act, 1930, was declared before the publication of these rules in the *Fort St. George Gazette*, a petition questioning such election may be presented under these rules within seven days *from* the date of such publication".

Mr. Narayanaswami Mudaliar drew attention to the fact that in the proviso the expression is "from the date of such publication". Section 9 (*b*) of the Madras General Clauses Act of 1891 lays down that the word "from" exclude the date from which we have to start our reckoning. While in the proviso the preposition "from" is used, the preposition used in the body of the rule is "of". This means, said Mr. Narayanaswami Mudaliar, that we must count the date of the declaration of the results of the election as the first day. The word "of" is an inclusive word and is to be contrasted with the word "from" which is exclusive. If we count the 11th of October as the first day the election petition would be out of time as it was presented only on the 18th of October.

No authority was placed before me that the preposition "of" is inclusive unlike the preposition "from" which the General Clauses Act makes exclusive.

On the other hand, I find in Stroud's Judicial Dictionary the following passage :

"'Of' is sometimes the equivalent of after. *e.g.* 'within 21 days of the execution' (Grants of Life Annuities Act, 1776 (17 Geo. 3, C. 26), section 3), Ex parte *Fallon*[1] ; *Williams* v. *Burgess*.[2]"

The prepositions "of" and "from" therefore mean the same thing. It follows that the election petition therefore was presented in time.

In the result, the Civil Revision Petition fails and is dismissed with costs.

R.M. ——— *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE RAJAGOPALA AYYANGAR.

CT.PL. Chidambaram .. *Petitioner**

v.

R. Muthukumaraswami Pillai and others .. *Respondents.*

Madras Hindu Religious and Charitable Endowments Act (XIX of 1951), sections 39 and 42—Effect of on schemes framed earlier—Qualification of trustees under earlier scheme—If could be overlooked—Misconduct of one of the members of the family of hereditary trustees—If abrogates the rights of other members to become hereditary trustee.

It is true that sections 39 and 42 of the Madras Hindu Religious and Charitable Endowments Act, 1951, abrogate certain provisions of the schemes already framed in regard to institutions within

1. 5 T.R. 283. 2. 10 L.J.Q.B. 10.
*W.P. Nos. 973 and 1429 of 1956. 16th December, 1957.

the Act and give a discretion to the Commissioner to appoint trustees to such institutions. If any particular scheme contained provisions which are found later to work to the detriment of the institution the proper mode of removing the hardship would be, not by ignoring the provisions of the scheme but by having the scheme amended by appropriate proceedings in that behalf. Where a scheme provides for a specific number of trustees to be appointed and their qualifications, the number might be varied by the Commissioner but the qualifications cannot be overlooked.

Where a member of a family from which a trustee is to be appointed under a scheme is found to be guilty of misconduct prejudicial to the interests of the institution his claim to trusteeship might be overlooked. But on that score the claim of the other members of the family cannot be rejected.

Petition under Article 226 of the Constitution of India, praying that in the circumstances stated therein, and in the affidavit filed therewith the High Court will be pleased to issue a writ of *certiorari* calling for the records relating to the order passed in proceedings, D. Dis. No. 2338 of 1956, dated 30th April, 1956, of the Commissioner, Hindu Religious and Charitable Endowments (Administration) Department, Madras, and quash the said order.

T. M. Chinnayya Pillai, for Petitioner in W.P. No. 973 of 1956 and for Respondents 3 and 4 in W.P. No. 1429 of 1956.

R. Sundaralingam, for Petitioner in W. P. No: 1429 of 1926.

The Additional Government Pleader (*K. Veerasami*), for 4th Respondent in W.P. No. 973 of 1956.

V. Srinivasan and *D. Sivagnanam*, for 3rd Respondent in W.P. No. 973 of 1956.

The Court made the following

ORDER.—These two petitions have only this in common, namely, that they raise similar points for consideration. The facts of each case are different and have to be set out fully.

W. P. No. 973 *of* 1956.—It is concerned *with* the Board of trustees of Sri Jambukeswaraswami temple, Tiruvanaikaval, Trichinopoly district. This temple is governed by a scheme framed by the Hindu Religious Endowments Board on 17th November, 1945. Clause (3) of that scheme stated :

"The said temple and its properties shall be administered by one or more non-hereditary trustees (not exceeding three) who shall be appointed by the Board. If there is a single trustee he shall be selected from the members of the S.RM.Ct. family of Kanadukathan in Ramnad district. Even when there are three trustees, at least one of them shall be selected from the said family."

The matters which give rise to this writ petition are briefly these. In pursuance of the provisions of this scheme three trustees had been appointed to the Trust Board, one of them being from S. R.M. Ct. family. The present petitioner is the son of this representative of the family. Charges of misconduct were framed against the petitioner's father and he was directed to be removed from office. This trustee filed an appeal against the order of removal and the appeal was pending on 30th April, 1956, when the Commissioner of the Religious Endowments Board passed an order whose legality is impugned in this petition. By his order he appointed three persons as trustees of this institution. It may be mentioned that on the date of this appointment one of the trustees had ceased to hold office by efflux of time.

The points urged on behalf of the petitioner against the legality of this order were two : (1) that clause (3) of the scheme provided for the maximum strength of the Trust Board to be three but this order of appointment, dated 30th April, 1956, would have meant that the Trust Board would be constituted of four members that is excluding the petitioner's father who had been removed from the office and the other trustee whose term had expired. (2) That the petitioner's father having been removed from the trusteeship, one trustee at least should have been selected from the S.R.M.Ct. family and that the appointment made ignoring this requirement of the scheme was invalid. In the counter-affidavit filed to this petition both these objections have been answered and in my opinion satisfactorily. The first objection has to be rejected because of the specific provision in section 42 of the Madras Act XIX of 1951. This section enacts :

"42. The power to appoint trustees under section 39 (which applies to the present case). . . . shall be exercisable notwithstanding that the scheme, if any, settled, or deemed under this Act to have been settled, for the institution contains provisions to the contrary";

and section 39 runs in these terms:

"39 (1) where a religious institution included in the list published under section 38. . . . has no hereditary trustee, the Commissioner shall constitute a Board of Trustees consisting of not less than three and not more than five persons appointed by him".

The provision, therefore, in clause (3) of the scheme limiting the maximum number of trustees to three stood abrogated by the conjoint operation of sections 42 and 39. In regard to the second objection, namely, that no member of the petitioner's family had been included as one of the trustees, it is pointed out in the counter-affidavit that it was the intention of the Commissioner to constitute a board of five persons and that one place had been reserved for a member of the family and that the place had not been filled up because on the date of the impugned appointment the appeal of the petitioner's father against his removal had not been disposed of. I hold this explanation satisfactory and find that there is no ground for questioning the validity of the order of the Commissioner.

Mr. Srinivasan, who appeared for the newly appointed trustees and who supported the impugned order, raised two other points: (1) that the family of the petitioner had forfeited all right to have any of its members as trustee by reason of their misconduct and acts prejudicial to the interests of the temple and (2) that in any event the provision in the scheme requiring that one of the members of the Trust Board should be a member of the petitioner's family should be deemed to be abrogated by reason of the provisions in sections 42 and 39 which conferred an unfettered discretion on the Commissioner in the matter of the hoice of proper trustees. I feel unable to accept either submission of learned counsel.

In the first place, I am unable to comprehend what is meant by the misconduct of a family. The family consisted of several members, some more remotely connected than others with the petitioner and his father. If any particular member out of this group was guilty of any prejudicial act, his claims might be overruled. I do not see any basis for the theory that by reason of the misconduct on the part of a particular individual other individuals against whom nothing could be said, also fell within the prohibition.

I am inclined to consider that sections 42 and 39 abrogate only the provision in regard to the number and not in regard to the qualifications to be possessed by persons to be appointed as trustees. If any particular scheme contained provisions which were found later to work to the detriment of the institution, the proper mode of removing the hardship would be, not by ignoring the provisions of the scheme but by having the scheme amended by appropriate proceedings in that behalf. There can be no doubt that at the time the scheme was framed the association of the members of any particular family with the management of the temple was conceived of, not merely as one calculated to be in satisfaction of the claims of that family, but also in the interests of the institution itself to provide for the management by a set of persons who could be expected to take more than ordinary interest in the welfare of the temple and its progress along right lines. It is for this reason that I consider that the provisions of the sort we have in clause (3) are not to be dismissed as outmoded and inconsistent with the advance in social conscience which the country has made in recent years. I have, therefore, no hesitation in rejecting the second contention urged on behalf of the respondents. The result is that the impugned order is not shown to be invalid and therefore the petition fails and is dismissed. Rule *nisi* will be discharged. There will be no order as to costs. I do not think it necessary to state in full the facts arising out of W.P. 1429 of 1956. The original scheme for the administration of the affairs of Sri Ranganathaswami and Sri Gnanapureeswara temples at Thirumaikottai, Mannargudi taluk, provided for a Trust Board not exceeding three trustees. By the impurgned order, this number was raised to five by appoinment of other ustees. On the terms of s ctions 39 and 42 to which I have adverted earlier, the order of the Commissioner would seem to be clearly within his powers. This Writ Petition also fails and is dismissed. Rule *nisi* is discharged. There will be no order as to costs in either petition.

R.M. ——— *Petitions dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE RAJAGOPALA AYYANGAR.

A.R. Ghazani Mohammed Sahib .. *Petitioner**

v.

The Official Receiver, Coimbatore .. *Respondent.*

Madras Cultivating Tenants Protection Act (XXV of 1955), section 3 and Provincial Insolvency Act (V of 1920), section 55—Eviction of tenant on the ground of arrears of rent—Original landlord adjudged insolvent—Leased lands vesting in Official Receiver—Payments made bona fide *to the former landlord—If binding on Official Receiver—Scope of.*

Where a cultivating tenant entered into a registered lease for a period of 5 years with his landlord and paid an advance which was to be adjusted in parts according to the terms and conditions of the contract of lease, on the adjudication of the landlord subsequently as insolvent, the Official Receiver will be equally bound by the terms of the lease. Any adjustment of payment made by the tenant, even though it is after the date of the presentation of the petition for adjudication, will also be binding and valid unless it is shown that the payment or adjustments were made after the tenant had actual knowledge of the insolvency proceedings within the meaning of section 55 of the Provincial Insolvency Act. A constructive knowledge or notice under section 19 of the Act by virtue of a Gazette notification intended for creditors of the insolvent, is not enough to take away the protection afforded under section 55 to *bona fide* payments.

Petitions under section 115 of Act V of 1908 praying the High Court to revise the orders of the Court of the Sub-Collector, Pollachi, dated 31st December, 1956 and made in C.M.C. Nos. 75 and 76 of 1956 respectively.

D. Ramaswami Ayyangar and *P. R. Varadarajan*, for Petitioner.

K. S. Ramamurthi and *T. R. Mani*, for Respondent.

The Court delivered the following

JUDGMENT.—These revision petitions have been filed to revise the orders of the Sub-Collector of Pollachi passed under section 3 of the Cultivating Tenants Protection Act directing the eviction of the petitioners on the ground that there were arrears of rent due from them. The ground urged by learned counsel for the petitioners was that there was really no arrears and that therefore orders for eviction should be set aside.

A few facts are necessary to be stated in order to appreciate the manner in which this point arises. The facts of the two petitions are nearly the same and as the points raised are identical it is sufficient to set out the facts involved in C. R. P. No. 538 of 1957.

The property from which the petitioners-tenants were sought to be evicted originally belonged to Messrs. Mohamed Hussain Sahib and four others who were adjudicated insolvents in I. P. No. 17 of 1953 on the file of the Sub-Court, Coimbatore. The property was leased out to the petitioners under a registered lease-deed dated 19th March, 1951, for an annual rental of Rs. 4,000 for a term of five years. At the time of the execution of the lease, the tenants paid the landlords an advance of Rs. 5,000 and in regard to this amount the lease provided that Rs. 1,000 out of it was to be adjusted towards the rent payable for the fourth year and the entire balance of Rs. 4,000 was to be taken as the rent for the fifth year. The tenant was paying the rent regularly at Rs. 4,000 a year for the first, second and third years and he paid a sum of Rs. 3,000 for the fourth year as stipulated in the lease deed.

The Official Receiver in whom the estate of the landlords vested, filed an application for eviction on the ground that the tenants were in arrears of rent which they had defaulted to pay. This was sought to be made out in the following manner. I.P No. 17 of 1953 in which the landlords were adjudicated as insolvents was presented on 2nd February, 1953. The adjudication order was passed on 13th July, 1955. The Official Receiver in his petition stated that all payments made to the insolvent after 2nd February, 1953 (the date of the presentation of I.P. No. 17 of 1953) as also

*C.R.P. Nos. 538 and 539 of 1957. 16th December, 1957.

all adjustments towards the rent made in pursuance of the conditions in the lease-deed in regard to rent payable after the date of the presentation of the petition, would not be binding upon him, with the result that on the date of the application for eviction the rent payable for the second, third, fourth and fifth years, namely, Rs. 16,000 would be due from the tenants and that in default of their paying this sum to him, he was entitled to an order for eviction. The Revenue Divisional Officer has accepted this contention and ascertaining that an arrear of Rs. 16,000 was due from the tenants directed their eviction in default of payment of this sum within a time limited.

There is no doubt that on the adjudication of the landlords on 13th July, 1955, the Official Receiver stepped into their shoes by operation of law. It is also undoubted that the title of the Official Receiver related back to the date of the presentation of petition, namely, 2nd February, 1953. The question that has now to be considered is whether from these it follows that payments made by the tenants to the insolvents or adjustments made in regard to the rents which had accrued due under contracts entered into long before the insolvency are or are not binding on the Official Receiver. The provision of law with reference to which, this matter has to be decided, is contained in section 55 of the Provincial Insolvency Act. Notwithstanding that section 28(7) of the Act provides for the order of adjudication relating back and taking effect from the date of presentation of the petition on which it was made, section 55 enacts :

"55. Subject to the foregoing provisions of this Act with respect to the effect of insolvency on an execution, and with respect to the avoidance of certain transfers and preferences, nothing in this Act shall invalidate in the case of an insolvency

(a) . . . .

(b) any payment or delivery to the insolvent.

(c) . . . .

(d) any contract or dealing by or with the insolvent for valuable consideration:

Provided that any such transaction takes place before the date of the order of adjudication, and that the person with whom such transaction takes place has not at the time notice of the presentation of any insolvency petition by or against the debtor."

Taking the facts of the present case it would be seen that payments which would be in dispute are those in relation to the second, third, fourth and fifth years which would be respectively due on 19th March, 1953, 19th March, 1954, 19th March, 1955 and 19th March, 1956, the first three payments being between the date of the presentation and the date of the order of adjudication and the last one, after the order of adjudication. It would be apparent from what has been stated earlier, that for the amount due on 19th March, 1953, a sum of Rs. 4,000 was paid in cash. This was on 26th February, 1953. The sum of Rs. 4,000 due on 19th March, 1954, was also paid in cash the payments being half on 5th July, 1953 and the other half on 27th February, 1955. The sum of Rs. 4,000 due on 19th March, 1955, was paid, Rs. 1,000 in cash on 27th February, 1955 and Rs. 3,000 by way of adjustment as stipulated in the lease-deed. The last instalment which was due on 19th March, 1956, was paid by adjustment as provided for in the contract. It would thus be seen that except the last payment all the other payments or adjustments were before the date of the adjudication though after the presentation of the petition, a situation for which section 55 made provision.

In the application filed by the Official Receiver there was no allegation that the tenants were aware of the presentation of the petition before they made the payments. In their statement of objections which they filed to the petition for eviction before the Revenue Divisional Officer, they specifically pleaded that they had no knowledge of the presentation of the petition. Witnesses were examined on behalf of the Official Receiver and in their evidence it was not suggested that the tenants had knowledge of the presentation of the petition. Nor was any document filed from which an inference that they had knowledge of these proceedings could be drawn. After the close of the evidence counsel on behalf of the Official Receiver appears to have produced before the Revenue Divisional Officer a copy of the *Fort St. George Gazette* in which the insolvency petition was advertised. Section 19 (1) of the Provincial Insolvency Act enacts :

"19 (1) where an insolvency petition is admitted, the Court shall make an order fixing a date for hearing the petition."

The sub-section (2) reads:

"(2) Notice of the order under sub-section (1) shall be given to creditors in such manner as may be prescribed."

The tenants who are the petitioners here had had dealings with the insolvents as a result of which the insolvents owed them moneys. When the petition which was admitted was advertised in the *Gazette* these tenants were shown as crediters in respect of those sums and their names were included in the advertisement. The Revenue Divisional Officer held that this publication in the *Gazette* of the insolvency proceedings constituted notice of the presentation of the petition which was sufficient to bring it within the terms of the proviso to section 55 and take it out of the operation of the main provision. I am unable to agree in this interpretation of the proviso. Section 55 is concerned with the validity of payments made by or to insolvents by persons who do so *bona fide*. The proviso makes provision for taking out of the protection of the substantive part of the section the payments and transactions which would not be *bona fide*, the test of *bona fides* being knowledge of the presentation of a petition. The knowledge that the section postulates would necessarily be factual knowledge. The constructive notice which section 19 (2) postulates would be wholly an insufficient basis for depriving a person of the protection afforded by section 55. The notice prescribed by section 19 (1) by publication in the *Gazette* is limited for the purpose of the assertion of rights as creditors and it cannot be held that from that constructive notice for particular purposes an actual knowledge of the pendency of the proceedings could be imputed sufficient to bring it within the proviso to section 55. If for instance the Official Receiver had been able to establish that the tenants had taken part in the insolvency proceedings or otherwise had notice in fact of the presentation of the insolvency petition either by seeing the publication in the *Gazette* or otherwise the case would have stood on a different footing. This apart, the publication in the *Gazette* was brought in after the conclusion of the evidence, when the tenants had no opportunity even to formally deny their knowledge of the publication. I, therefore, hold that the payments are protected by section 55.

This would, however, extend only to the second, third and fourth years' rents and not to be adjustment in regard to the last year in respect of the rent due on 19th March, 1956, a date subsequent to the order of adjudication. In regard to this, the Court below has held that it was not protected even by section 55 of the Provincial Insolvency Act. The case in regard to this, however, rests on a different principle. There was a contract entered into between the insolvents and the tenants in 1951—long prior to the insolvency. It is an elementary principle of insolvency law that subject to the special provisions enacted by the insolvency statute sections 51 to 54—the Official Receiver merely steps into shoes of the insolvent and can claim no higher rights than the insolvent. If the contract to adjust was binding on the insolvents it was equally binding on the Official Receiver who is merely their representative in law. The agreement to adjust was, therefore, binding on the Official Receiver and there is really no legal basis upon which that adjustment could be disputed by the Official Receiver or be held not binding on him. The Revenue Divisional Officer has, in this connection, referred to a decision of the Patna High Court in *Ramlal Marwari* v. *Mahdeo Marwari*[1], as support for holding the adjustment not to be binding. The case itself involved a construction of section 50 of the Transfer of Property Act and the portion of the decision extracted by the Revenue Divisional Officer runs:

"Section 50 of the Transfer of Property Act protects a tenant against having to pay his rent twice over if paid in good faith. But if he had paid the rent before it was due, it is merely an advance to the landlord and is not a payment in fulfilment of an obligation to pay rent. . . . consequently an advance payment will not save him from liability."

I am unable to read the passage as a statement of the law that a contract for an adjustment of rent paid at the commencement of a lease is a *mala fide* payment and that if after receiving the sum the landlord transferred the property to another, the tenant was

1. (1921) 63 Ind. Cases 587, 588.

bound to pay once over the rent due for the period commencing from the date of the transfer. If the decision can be taken to lay down this law, I must respectfully dissent from it. An assignee takes the property only as it was, on the date of the assignment and if on such date a third person has rights over the property, the assignee takes it and subject to those rights. I am clearly of the opinion that the contract to adjust the rents or the rental out of the advance paid in March, 1951, was binding on the Official Receiver with the consequence that the adjustment effected in pursuance thereof was equally binding on him. This would be sufficient to dispose of the petitions but learned counsel for the petitioners also urged another argument which would show that the order of the Revenue Divisional Officer holding that arrears were due for second and third years was erroneous. Section 3 (2) (*a*) of the Madras Cultivating Tenants Protection Act under which the application for eviction was filed enacts that the only arrears which a tenant could be directed to pay under the provision of that Act and in regard to which a conditional order for eviction could be passed was arrears of rent which accrued due subsequent to 31st March, 1954. On this basis only the non-payment of the fourth and fifth instalments of rent could be arrears for which eviction could be ordered. In regard to the fourth instalment Rs. 3,000 was paid and if it was a payment protected by section 55 it would be deemed as a payment to the landlords. The other adjustment of Rs. 1,000 and 4,000 I have already upheld as binding on the Official Receiver.

The result, therefore, is that there was no arrear of rent due from the petitioners which they could be made to pay and in default their eviction ordered from the suit property. C.R.P. No. 538 of 1957 has, therefore, to be allowed and the order of the Revenue Divisional Officer set aside.

As I have already stated earlier, the facts in C.R.P. No. 539 of 1957 are very similar except as to the amounts of rent involved and the due dates. For the reasons just now stated C.R.P. No. 539 of 1957 is also allowed and the order of eviction passed is also set aside. The Official Receiver will pay the costs of the petitioners in both the petitions.

R.M. — *Petitions allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. P. RAJAGOPALAN, *Officiating Chief Justice* AND MR. JUSTICE BASHEER AHMED SAYEED

S. Ratnasami Mudaliar .. *Appellant**

v

Ponnammal and others .. *Respondents.*

Madras Cultivating Tenants Protection Act (XXV of 1955), section 6-A—Applicability—Suit for possession—Defence that person, in possession is a 'cultivating tenant'—Procedure.

Under section 6-A of the Madras Cultivating Tenants Protection Act if the Civil Court finds that the claim put forward by the person in possession that he is a 'cultivating tenant' is correct, then the Court shall not proceed with the trial but shall transfer the proceeding to the Revenue Divisional Officer to be dealt with according to the provisions of the Act.

Velachami Naicker v. *Mouna Guruswami Naicker*, (1957) 2 M.L.J. 628 (D.B.), followed.

Appeal under Clause 15 of the Letters Patent, preferred to the High Court against the Judgment and Decree of Mr. Justice Ramaswami, dated 6th March, 1957, and passed in Appeal No. 52 of 1954 (preferred to the High Court against the decree in O.S. No. 73 of 1952 on the file of the Court of the Subordinate Judge of Tanjore.)

T. S. Kuppuswami Ayyar and *K. S. Naidu*, for Appellant.

T. R. Ramachandran, for Respondents.

*L.P.A. No. 70 of 1957. 31st January, 1958.

The Judgment of the Court was delivered by

Rajagopalan, O.C.J.—The first defendant is the appellant. The appeal itself at this stage is confined to items 10, 11, 17, 18, 24, 27 to 30, 36 to 41 and 44 to 47 of the schedule to the plaint. It is common ground that these are all wet lands. In paragraph 11 of the written statement filed in the suit the first defendant pleaded that he was a lessee in possession of all these items, and the plea in paragraphs 11 and 13 of the written statement was that he was a cultivating tenant within the meaning of Act XIV of 1952. After the first defendant filed his written statement the plaintiffs obtained permission and amended the plaint, introducing paragraph 17 (*a*) and in para. 21 (*d*) (1) the plaintiffs as the basis for the alternative relief they asked for, that if it was found that the first defendant was a tenant under the plaintiffs of the items specified above, he would still be liable to be evicted and that the plaintiffs were still entitled to get possession.

Issue 4 of the issues framed by the learned Subordinate Judge ran :

"Whether the 1st defendant is a lessee in respect of items 10, 11, 17, 18, 24, 27, 28, 29, 30, 36 to 41, 44 to 46 and 47 of the plaint schedule and whether he is entitled to claim the benefits of the Tanjore Tenants and Pannaiyal Protection Ordinance No. VI of 1952 ?"

It may not be necessary to trace all the legislative changes since Act XIV of 1952 came into force with effect from 23rd August, 1952. When Madras Act XXV of 1955 was first enacted, it did not at first apply to the area in which Act XIV of 1952 was in operation. Subsequently, however, Act XIV of 1956 in effect made Act XXV of 1955 applicable to the area where Act XIV of 1952 was in operation, subject to certain alterations with which we need not concern ourselves at this stage. Act XIV of 1956 received the assent of the President on 29th September, 1956 and was published in the *Gazette* on 1st October, 1956.

It cannot be denied that the litigation before us has to be dealt with under section 6-A of the Act XXV of 1955, which was enacted by the amending Act XIV of 1956.

What the learned Subordinate Judge did was to direct the eviction of the first defendant from these items, while reserving a right to the first defendant to establish his non-liability for eviction from one or more of these items in properly constituted proceedings before the revenue authorities under Act XIV of 1952 provided the first defendant took these steps within five months of the decree. That was confirmed by Ramaswami, J., when he disposed of the appeal preferred by the first defendant, A.S. No. 52 of 1954. It is the correctness of that direction that is really challenged in this appeal preferred under Clause 15 of the Letters Patent.

As we have said, that the question at issue between the parties has to be disposed of in accordance with section 6-A of Act XXV of 1955, can admit of no doubt. The procedure to be followed in such cases has been indicated by a Division Bench of this Court in *Veluchami Naicker* v. *Mouna Guruswami Naicker*[1].

The learned Subordinate Judge found that though the plaintiffs' case that the first defendant was not a tenant at all could not be accepted and though there was evidence to show that the first defendant was a lessee under the plaintiffs of some lands, the evidence on record was not sufficient to show whether the first defendant was a lessee under any of the plaintiffs with reference to the items mentioned in Issue 4. That was really the basis on which he gave an option to the first defendant to pursue the matter before the revenue authorities in properly constituted proceedings under Act XIV of 1952. Learned counsel for the appellant urged that the attention of the parties was focussed at the stage of the trial before the learned Subordinate Judge only on the question whether the first defendant was a tenant as pleaded by him or whether he was only an agent of the plaintiffs in possession of the lands in his capacity as such agent, and not a tenant or lessee at all, and that neither party devoted any attention to the question, whether if the first defendant was a lessee or tenant under the plaintiffs, of what items he was such a lessee. The evidence is certainly meagre. All that the first defendant swore to was:

1. (1957) 2 M.L.J. 628.

"It is not true that any of the lessees are in possession of the lands in my possession. I am the real lessee. It is not true I have asked some others to execute lease deeds."

There was very little by way of cross-examination, at any rate directed to the item specified in Issue 4.

Since the question at issue has to be disposed of in accordance with section 6-A in the first instance it is for the civil Court to decide whether the claim put forward by the first defendant that he was a cultivating tenant is correct.

The only question that arises for consideration is whether the first defendant should be given an opportunity at his stage to place all the evidence available to him to prove with reference to each of the items specified in Issue 4 that he was a tenant or lessee under the plaintiffs and, therefore, a cultivating tenant within the meaning of Act XXV of 1955. Since, as we pointed out earlier, the attention of the parties was not focussed on this aspect of the case, we think that the first defendant should be given such an opportunity subject to terms. It is true that when the learned Judge, Ramaswami, J., disposed of the appeal, this aspect of the case was not presented to him, whether the appeal before him should not be decided with reference to section 6-A of Act XXV of 1955. That will also be taken into consideration in subjecting the appellant-first defendant to terms.

On condition that the first defendant pays all the costs incurred by the plaintiffs up to this stage irrespective of the ultimate disposal of the suit, the decree of the learned Subordinate Judge in relation to the items specified in Issue 4 will be set aside and that of the learned Judge confirming it will also stand set aside, and the suit will be remanded for disposal afresh after a decision on Issue 4, in the light of our above observations and in accordance with section 6-A of Act XXV of 1955. If the amount is not deposited within two months from the date of the receipt of the records by the lower Court, the appeal will stand dismissed with costs.

If the amount is deposited it can be paid out to the plaintiffs on their application. Issue 4 will be tried afresh and both parties will be given an opportunity by the Court to place such evidence as they have on record for the determination of Issue 4.

This case having been set down for being mentioned this day, the Court made the following

ORDER.—What the plaintiff is really entitled to under our order is the costs as taxed and no more. Costs taxed were only Rs. 839-11-7.

V.S. ——— *Decree set aside : Suit remanded.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE GANAPATIA PILLAI.

P. Veeranna Thevar .. *Appellant**

v.

Karuppayi and others .. *Respondents.*

Adverse possession—Usufructuary mortgagee in possession—Title by trespasser—When can be claimed.

A person setting up title by adverse possession in the case of a property in the possession of a mortgagee must show knowledge of such possession by the mortgagor and unless the requisite length of possession is established as also the fact that this possession is open, adverse and to the knowledge of the mortgagor, no trespasser can claim title by adverse possession against the mortgagor.

Peria Aiya Ambalam v. *Shanmughasundaram*, (1913) 26 M.L.J. 140 : I.L.R. 38 Mad. 903 (F.B.), followed.

Appeal against the Decree of the Court of the Subordinate Judge of Madurai in A.S. No. 117 of 1952 preferred against the Decree of the Court of the District Munsif of Tirumangalam in O.S. No. 352 of 1950.

* S.A. No. 139 of 1955. 18th October, 1957.

K. Veeraswami and *V. Ramaswami*, for Appellant.

R. Aravamuda Ayyangar, for Respondents.

The Court delivered the following

JUDGMENT.—The appellant in this second appeal was the plaintiff in a suit for redemption of a usufructuary mortgage Exhibit A-4 of the year 1917. His case was that the mortgaged property belonged to one Mayandi Thevar who had mortgaged it usufructuarily in favour of one Chinna Thevar for Rs. 125 in 1917 and he was the purchaser of the equity of redemption. This Chinna Thevar is the deceased husband of the 1st defendant in the suit. In 1927, the mortgagee Chinna Thevar executed a sub-othi Exhibit A-5 of the suit property in favour of his younger brother the 2nd defendant. The 3rd defendant in the suit is a still younger brother of the mortgagee under Exhibit A-4. The main contest was raised by the 3rd defendant who contended that he was the owner of the property in dispute having acquired it in an oral partition in his family and also by adverse possession. The truth and genuineness of the mortgages Exhibits A-4 and A-5 were also put in issue. The trial Court found that Exhibits A-4 and A-5 were true and genuine but on the question of paramount title pleaded by the 3rd defendant it found against him because it specifically held that neither the oral partition nor the adverse possession pleaded by him was made out. But unfortunately the trial Court dismissed the suit without giving a decree for redemption at least against defendants 1 and 2 when it had held that the mortgages Exhibits A-4 and A-5 were true and genuine. In the lower appellate Court the learned Subordinate Judge agreed with the finding of the trial Court as regards the truth and genuineness of Exhibits A-4 and A 5 but he differed from the trial Court on the question of adverse possession. According to the learned Subordinate Judge, the 3rd defendant had prescribed title by adverse possession and for this conclusion he relied upon the fact that plaintiff had not proved possession of the mortgagee within 12 years before suit. The Full Bench decision in *Official Receiver, East Godavari* v. *Govinda Raju*[1], lays down that in a suit for ejectment the plaintiff must establish possession within 12 years before suit to show that he has a subsisting title. That decision has no relevance whatsoever to the question which arose to be decided before the lower appellate Court. A person setting up acquisition of title by adverse possession in the case of a property in the possession of the mortgagee according to the Full Bench decision in *Periya Aiya Ambalam* v. *Shanmughasundaram*[2], must show knowledge of such possession by the mortgagor and unless the requisite length of possession is established as also the fact that this possession is open, adverse and to the knowledge of the mortgagor, no trespasser can claim title by adverse possession against a mortgagor. The finding of the trial Court in this case that the 3rd defendant had not acquired title by adverse possession is based upon good reasons as could be seen from the fact that the 2nd defendant and the husband of the first defendant were both elder brothers of the 3rd defendant. To say that these elder brothers took othis of their own family property in 1917 and 1927 will be almost absurd. Even if Exhibit A-4 is said to be a document which was executed without the knowledge of the husband of the 1st defendant, Exhibit A-5 clinches the issue since the 1st defendant's husband himself has executed it in favour of his own brother the 2nd defendant in 1927. It is nowhere suggested in the evidence that these two brothers and the 3rd defendant were inimically disposed towards each other or that they had any motive to injure the 3rd defendant. Under the circumstances the finding of the appellate Judge on the question of adverse possession is clearly wrong and has to be set aside.

The second appeal is, therefore, allowed and there will be a preliminary decree for redemption of the mortgage covered by Exhibit A-4. The appellant will have his costs in all the Courts payable by defendants 1 and 3.

No leave.

V.S. —————— *Appeal allowed.*

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1. (1940) 2 M.L.J. 190 : I.L.R. (1940) Mad. 953 (F.B.).

2. (1913) 26 M.L.J. 140 : I.L.R. 38 Mad. 903 (F.B.).

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. P. RAJAGOPALAN, *Officiating Chief Justice* AND MR. JUSTICE RAJAGOPALA AYYANGAR.

Marayi Ammal .. *Plaintiff**

v.

Nallaya Gounder .. *Defendant.*

Civil Procedure Code (*V of* 1908), *section* 113, *Proviso—Reference to High Court—Duty of Subordinate Court.*

A reference under the Proviso to section 113, of the Civil Procedure Code by a Subordinate Court to the High Court on the question of the validity of an Act or Ordinance could be made only if the Court records its *prima facie* finding that the impugned Act or Ordinance is invalid. Otherwise the reference will be incompetent.

Case referred to the High Court by the District Munsif of Namakkal, under section 113, Civil Procedure Code, as the defendant in O.S. No. 248 of 1955 on his file has raised a substantial question of law as to the interpretation of the Constitution of India for decision *viz.*:

(1) Whether the Ordinance V of 1953, Act V of 1954 and Act I of 1955 are all or any one of them, is *ultra vires* as offending Articles 13, 14 and 21, of the Constitution and being the 1st issue framed in the suit.

T. K. Subba Rao, for the Plaintiff.

The Advocate-General (*V. K. Tiruvenkatachari*) and *B. Ratnasabapathi*, for the Defendant.

The Judgment of the Court was delivered by

Rajagopala Ayyangar, J.—This is a reference to this Court by the District Munsif of Namakkal purporting to be under the Proviso to section 113, Civil Procedure Code and the questions as regards which the decision of this Court is sought are three.

" (1) Whether the Ordinance V of 1953, Acts V of 1954, and I of 1955 are all, or any one of them, is *ultra vires* as offending Articles 13, 14 and 21 of the Constitution.

(2) Whether the suit is barred by limitation ?

(3) To what relief the plaintiff is entitled.

Obviously questions 2 and 3 do not raise points which are capable of being referred to this Court under the Proviso to section 113, Civil Procedure Code. But this apart, even as regards the first question, the learned District Munsif has not recorded any finding that in his opinion the provision whose validity was impugned appeared to him *prima facie* to be invalid, though that is a condition required by the provision before a reference could be made to this Court. The reference, therefore, was incompetent. The reference is discharged as incompetent.

No order as to costs.

R.M. ——— *Reference discharged.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE RAJAGOPALA AYYANGAR.

M. Subbaraja Mudaliar .. *Petitioner†*

v.

Commissioner of Income-tax, Madras and another .. *Respondents.*

Income-tax Act (*XI of* 1922), *section* 35 (1)—*Scope—Rectification of mistakes apparent from the record—Misconstruing the scope of the second proviso to section* 17 (1) *of the Act—Jurisdiction of the Officer to rectify—Writ.*

The assessee, a non-resident, for the assessment year (1953-1954) made a declaration as contemplated by the first proviso to section 17 (1) of the Act on 29th September, 1953 and the Income-tax

* Case Referred No. 14 of 1956. 13th December, 1957.

† Writ Petition No. 334 of 1956. 16th September, 1957.

Officer treated as a proper exercise of the option conferred by the statute computed the tax liability on that basis and completed the assessment on 31st December, 1953. Subsequently in May, 1955, notice was issued to the assessee stating that a mistake apparent from the record had been committed in regard to the assessment which required rectification. The point on which the mistake is said to have been committed was that the assessing authority had misconstrued the scope of the second proviso to section 17 (1) as enabling him to condone the delay in the exercise of the option.

Held : The jurisdiction of the officer to rectify a mistake is dependent on the mistake being apparent from the record. It is no doubt true that a mistake capable of being rectified under section 35 is not confined to clerical or arithmetical mistakes. On the other hand it does not cover any mistake which may be discovered by a complicated process of investigation argument or proof.

That the assessing officer misconstrued the scope of the second proviso to section 17 (1) of the Act as enabling him to condone the delay in the exercise of the option would certainly not be a mistake apparent from the record. The scope of the proviso is, to say the least, not so absolutely clear as to preclude an argument that it would apply to the case of the petitioner. In this view the mistake, assuming one existed was not apparent from the record within the meaning of section 35 (1) of the Act and the order of the Income-tax Officer rectifying the mistake is clearly without jurisdiction.

Petition under Article 226 of the Constitution of India, praying that in the circumstances stated therein and in the affidavit filed therewith the High Court will be pleased to issue a writ of *certiorari* calling for the records relating to the order in G.I. No. 88-S of 53-54 dated 10th May, 1955, passed under section 35 of the Income-tax Act by the Income-tax Officer, Cuddalore and quash the said order.

K. Srinivasan and *K. Sarvabhauman*, for Petitioner.

C. S. Rama Rao Sahib, Special Counsel for Income-tax, for Respondents.

The Court made the following

ORDER.—The order of the Income-tax Officer, Cuddalore, revising the assessment of the petitioner under section 35 of the Income-tax Act is challenged in this petition as beyond the jurisdiction and power of the Officer.

The proceedings are concerned with the assessment year 1953-54. The petitioner who is the assessee was a non-resident and he was residing at Penang. For the assessment year in question the Income-tax Officer completed the assessment and issued an order on 31st December, 1953, computing the total income of the assessee at Rs. 27,560 and treating the assessee as a non-resident. Section 17 (1) of the Act provides for the determination of the tax payable in certain cases including that by individuals not resident in the taxable territories. The tax payable by a non-resident assessee is under this section computed on the basis of the maximum rate applicable to his total income liable to tax. The assessee is, however, given an option by the first proviso to section 17 of the Act to effect a declaration and on this being made, the tax would be assessed on the basis of the rate applicable to his total world income the relevant words being

> " such tax shall be the amount bearing to the total amount of tax including super-tax which would have been payable on his total world income had it been his total income the same proportion as his total income bears to his world income."

Before the assessment was completed, that is, before 31st December, 1953, the petitioner made a declaration contemplated by the first proviso to section 17 (1) on 29th September, 1953 and the Income-tax Officer treated this as a proper exercise of the option conferred by the statute and computed the tax liability on the basis of that set out in the words of the first proviso which I have extracted. Subsequently in May, 1955, the Income-tax Officer issued a notice to the petitioner stating that a mistake apparent from the record had been committed in regard to the assessment which required rectification. The mistake pointed out was that the first proviso to section 17 (1) of the Act made provision for the option being exercised by the declaration made on or before the dates specified in the proviso and that the declaration made on 29th September, 1953, would not be deemed to be a proper declaration within the words of the proviso and that if this were so, the declaration should have been treated *non est* and that the computation of the tax should have been on the basis of the maximum rate applicable under section 17 (1) and not under the first proviso. The assessee raised an objection to the jurisdiction of the Income-tax Officer stating that no mistake had been committed to justify any rectification under section 35. This was overruled and an order was passed on 10th May, 1955, rectifying the assessment and

demanding a sum of Rs. 3037-2-0 as excess tax payable under section 35 (4) of the Act. The assessee preferred a revision to the Commissioner of Income-tax under section 33-A (2) but this was dismissed and he has consequently filed this petition seeking relief at the hands of this Court under Article 226 of the Constitution.

The jurisdiction of the Officer to rectify a mistake is dependent on the mistake being apparent from the record. It is no doubt true that a mistake capable of being rectified under section 35 is not confined to clerical or arithmetical mistakes. On the other hand, it does not cover any mistake which may be discovered by a complicated process of investigation, argument or proof. In the present case that a declaration which purported to be under the first proviso to section 17 was filed by the assessee though out of time, if regard were had only to the dates specified in the first proviso, is not in controversy. That this declaration was treated by the Assessing Officer as one within the first proviso and that the assessment proceeded on the basis that the assessee had properly exercised his option is also not in dispute. The point, however, on which the mistake is said to have crept in was that the assessing authority had misconstrued the scope of the second proviso to section 17 (1) as enabling him to condone the delay in the exercise of the option. This would certainly not be a mistake apparent from the record. The scope of the second proviso is, to say the least, not so absolutely clear as to preclude an argument that it would apply to the petitioner's case. In this view I am clearly of the opinion that the mistake, assuming one existed, was not apparent from the record within the meaning of section 35 (1) of the Act and the order of the Income-tax Officer rectifying the mistake with which the Commissioner refused to interfere is clearly beyond the jurisdiction of the assessing authority under section 35 of the Act.

The result is that the petition succeeds and the rule is made absolute. The order of the Income-tax Officer is set aside. The assessee is entitled to his costs. Counsel's fee Rs. 100.

V.S. *Rule made absolute.*

[END OF VOL. I (1958) M.L.J.]

GENERAL INDEX.

HIGH COURT.

ADVERSE POSSESSION—Usufructuary mortgagee in possession—Title by trespasser—When can be claimed .. 429

ARBITRATION ACT (X OF 1940), S. 17—Suit to enforce an award—Person *eo nomine* not a party to the reference to arbitration impleaded as a party to the suit—Order appointing Receiver in respect of his properties—Legality .. 94

———S. 32—Arbitration award—Bar of suit under—Applicability .. 324

CANTONMENT ACT (II OF 1924), S. 203—Power of a Cantonment Board to levy license fees for opening of a market—If includes a right to collect licence fee for renewal of licence .. 349

CATTLE TRESPASS ACT (I OF 1871), Ss. 11 and 24—Applicability to trespass on Reserved Forest land .. 245

CIVIL PROCEDURE CODE (V OF 1908), S. 2 (11)—Legal representative—Daughter made successor matathipathi by will .. 230

———S. 13 and S. 20—Suit on an *ex parte* foreign judgment—Where maintainable—Suit for recovery of money under a foreign judgment—Cause of action for—Institution of suit where defendant owns immoveable property—Jurisdiction .. 194

———S. 20 (*c*)—Cause of action at a place where money under the contract was payable—Jurisdiction .. 294

———S. 35 (2)—Awarding of costs—Principles .. 188

———S. 47—Order on application for payment of decree amount in instalments—If appealable under S. 47 .. 229

———S. 100—Finding of fact—Concurrent finding of lower Courts that gift by Muhammadan donor was not brought about by undue influence and was not affected by Marz-ul-mout—Finality in second appeal—Finding arrived at by wrongly throwing onus of proof—Finality of—Plea not urged or put forward and not considered by lower Courts—If can be urged and considered in second appeal .. 14

———S. 113, Proviso—Reference to High Court—Duty of Subordinate Court .. 431

———S. 115—Refusal to strike out issue—Revision—Interference .. 212

———S. 115—Revisional jurisdiction of High Court—Finding of fact by lower Court vitiated by wrong approach—Interference with .. 73

———S. 144 and O. 41, R. 6—Scope of—Restitution under O. 41, R. 6—If means the same as in S. 144—Security in cases of restitution under S. 144—Court if bound to order .. 408

———S. 151—Inherent powers .. 183

———O. 6, R. 17 and S. 92—Suit under S. 92—Relief of removal of trustees—Amendment pleading invalidity of the appointment of trustees—Whether can be allowed .. 332

C. P. CODE (1908)—(*Contd.*)

———O. 6, R. 17—Powers of Court—Amendment of written statement—Suit for partition by Hindu daughter-in-law against father-in-law and brothers-in-law—Father-in-law claiming certain properties as separate properties not liable to partition—Amendment seeking to add another item to the list of separate properties—Refusal—Propriety—Interference in revision—S. 115 .. 302

———O. 14, Rr. 1 and 5 (2)—Issues—Duty of Court in framing—Suit for declaration of title to half share in properties—Defendants contesting claim and pleading for dismissal of suit—Defendants having dispute *inter se* but not seeking adjudication thereon—Issue as to shares of parties in property—Propriety—Refusal to strike out issue—Revision—Interference .. 212

———O. 18, R. 18—Local inspection by Court—Notes of local inspection—Duty to make and keep it as part of the record—Failure to do so—If vitiates the judgment—Desirability of amending the rule .. 340

———O. 20, R. 11 (2) (as amended in Madras) and S. 47—Order on an application for payment of decree amount in instalments—If appealable under S. 47 of the Code .. 229

———O. 20, R. 12—Decree for mesne profits under—If a final order .. 99

———O. 20, R. 12—Determination of mesne profits—Procedure .. 250

———O. 20, R. 16—Suit by principal against agent for accounts—Allegation that the account books had been handed over by the agent to the principal who had suppressed and not produced them—If entails dismissal of suit—Proper course to adopt .. 396

———O. 21, R. 91—Confirmation of sale held in execution—Pendency of an application by a third party offering a higher price—Sale confirmed without notice to such applicant—Validity .. 28

———O. 21, R. 100 and S. 115—Application for redelivery of property taken in execution—Delay in—Good faith—Inconsistent stand taken by the applicant—If could be excused—Interference by High Court in revision in respect of discretionary orders of lower Court—Scope of .. 402

———O. 33, Rr. 5 and 7—Appeal from order rejecting application for leave to sue as pauper—When lies .. 97

———O. 39, Rr. 1 and 2—Jurisdiction to grant injunction—If ousted in suit under S. 62 of Madras H. R. and C. E. Act, 1951 .. 256

C. P. CODE (1908)—(*Contd.*)

———O. 39, R. 1 (*a*)—Property in dispute in danger of being wrongfully sold in execution of decree—Interim injunctions—If could be ordered against a person who is not a party to the main suit .. 303

———O. 41, R. 5—Stay of suit—Suit by wife against husband for her own maintenance and for that of minor children—Subsequent petitions by husband for custody of children and for restitution of conjugal rights—If ground for stay of maintenance suits .. 210

———O. 42, R. 1, Cl. (*rr*)—(Madras Amendment) and O. 33, Rr. 5 and 7—Appeal from an order rejecting an application for leave to sue as a pauper—When could lie .. 97

CONSTITUTION OF INDIA (1950), Art. 14—If contravened by S. 3 of Madras H. R. and C.E. Act, 1951 .. 248

———Arts. 14 and 19 (1) (*g*)—If contravened by Exports Control Order (1954), Cl. (7). 338

———Art. 191 (1) (*a*) and (*e*)—Representation of the People Act (XLIII of 1951)—Office of profit—What amounts to—Employee of Life Insurance Corporation of India—If hold an office of profit under the Government of India—Regulation of the Corporation prohibiting its employees from standing for election—If amounts to a law disqualifying the candidate within the meaning of Art. 191 (1) (*e*) of the Constitution .. 367

———Art. 226—Discretionary relief—Petitioner acquiescing in the wrong complained of—If estopped from questioning it—Principle .. 1

———Art. 226—*Certiorari*—Issue of writ—Another remedy open—Appealable order not appealed from—Effect of—Natural justice—Opportunity to show cause—Denial of—What amounts to—Assessment to sales-tax— Revision and re-assessment—Claim by assessee to exemption—Necessary material and evidence against assessee set out in notice and opportunity furnished to substantiate claim to exemption—Assessee failing to avail himself of same—Assessee's request for certified copies of documents containing facts known to him not granted—Order of assessment—If denial of opportunity—Right to issue of writ .. 30

———Art. 226—Interlocutory orders—Interference—Powers of High Court—Election tribunal refusing to decide certain issues as preliminary issues—Interference by writ of prohibition—Principles—Existence of another remedy by way of appeal—If bar to interference by writ .. 110

———Art. 226—Judge of High Court constituted Industrial Tribunal—Orders of—Interference with by the High Court under Art. 226 .. 164

———Art. 226—Jurisdiction of High Court .. 410

———Art. 226—Jurisdiction under—Nature and scope of .. 352

———Article 226—Powers of High Court under—Scope of interference in the administration of autonomous bodies like a University .. 214

———Arts. 233 to 237—Scope—G.O. integrating Civil and Criminal Judicial offices—Validity—Consultation with the Public Service Commission—Arts. 310 and 311—Scope—Tenure of offices under Government—G.O.

CONSTITUTION OF INDIA (1950)—(*Contd.*)

varying and refixing seniority—Whether gives rise to a justiciable right. .. 38

COURT-FEES—Computation of—Appeal against an order determining mesne profits—Court-fee—If payable on *ad valorem* basis .. 250

———Refund of—Memorandum of appeal with deficit Court-fee—Returned and not re-presented—Appeal becoming unnecessary—Refund of Court-fee paid—When permissible .. 183

COURT-FEES ACT (VII OF 1870), as amended in Madras, S. 7 (iv) (*b*)—Scope—Suit for partition—Reply notice denying right to partition and joint possession—Proper Court-fee payable .. 199

———(as amended in Madras), S. 6 and Madras City Civil Courts Act (VII of 1892) as amended S. 8 (1) of Madras Act (X of 1955)—Transfer of suits from the Original Side of the Madras High Court to the City Civil Court—Levy of additional Court-fee on such transferred suits—Whether can be made .. 263

CRIMINAL PROCEDURE CODE (V of 1898), S. 204 (1-A)—Right of a complainant, in a private complaint to file additional list of witnesses or vary the original list filed—Procedure .. 389

——S. 342—Examination of accused under—Necessity for, in case before Railway Mobile Court .. 242

———S. 417 (4)—Delay in applying for Special Leave—If could be excused—Limitation Act (IX of 1908), S. 5—Applicability. 388

CRIMINAL TRIAL—First Information Report—Nature and purpose of—Offence of rioting—How proved—Infirmities in the First Information Report—Effect .. 6

———Practice—Excusing delay in filing appeal against acquittal—Right of the accused to contest .. 245

———Practice—Payment of compensation to the accused—Legality .. 347

DEED—Construction—Gift of property equally in favour of two or more persons with a gift over to the descendants of one of them—Gift over—When will take effect—Death of one of the beneficiaries—Rights of the surviving beneficiaries—Theory of cross-remainder .. 289

———Construction—Husband settling property on his wife—Subsequent clause property should be enjoyed by the settlee and by the male heirs from generation to generation—Effect of. 335

DIVORCE ACT (IV OF 1869), S. 36—Alimony *pendente lite*—Quantum of—Net average income—What is—Cost of the suit—Provision for—Circumstances to be taken into consideration .. 393

ELECTIONS—Municipal Elections—Tribunals under—Power to allow further particulars. 184

EVIDENCE ACT (I OF 1872), S. 65 (*a*), Cls. (2) and (3)—Scope—Secondary evidence by a copy of a document—Admissibility .. 96

———S. 116—Estoppel—Lessor and lessee—Usufructuary mortgage under which lessor was in possession declared invalid—Notice by true owner to lessor and lessee—Plea of estoppel—Whether would enure after such notice .. 406

GOVERNMENT SERVANT ON PROBATION—When becomes full member of service—Mere expiry of a period of probation—If makes him full member of the service—Matters that can be considered by superior officer while deciding about suitability to become full member of the service .. 234

HINDU LAW—Religious Endowment—Mutt—Matathipathi—Powers and functions of—Death of Matathipathi pending litigation—Will making daughter successor Matathipathi—Competency of daughter to come on record as "legal representative"—Civil Procedure Code (V of 1908), S. 2 (11) .. 230

HINDU SUCCESSION ACT (XXX OF 1956), S. 14—Construction—Suits by reversioners filed prior to the commencement of the Act for declaration that alienation by widow was not binding—How far maintainable after the Act .. 101

IMPORTS AND EXPORTS (CONTROL) ACT (XVIII OF 1947), S. 3—Exports (Control) Order (1954), Cl. 7—Scope—Powers of Central Government—Decision to prohibit export of dry chillies—Subsequent grant of special permission to export to certain co-operative societies at the request of Government of foreign country—Legality—Arts. 14 and 19 (1) (g), Constitution of India (1950)—If violated—Non-publication of permission in Gazette—Effect of .. 338

INCOME-TAX ACT (XI OF 1922), S. 18-A (1) Mistake of the Income-tax Officer in fixing the date of instalments—Non-payment of advance tax—Whether penalty can be imposed .. 211

———S. 18-A (3) and (8)—Scope of .. 344

———S. 28—Applicability—Initiation of proceedings for levy of penalty—What amounts to .. 416

———S. 35—Scope of .. 201

———S. 35 (1)—Scope—Rectification of mistakes apparent from the record—Misconstruing the scope of the second proviso to S. 17 (1) of the Act—Jurisdiction of the Officer to rectify—Writ .. 431

———S. 46 (2) and (7)—Recovery of tax—Certificate under S. 46 (2) to the Collector—Subsequent reduction on appeal of tax due—Effect on original certificate .. 90

———S. 46 (2)—Scope of—Recovery of arrears of tax by issue of certificate to the Collector—If applicable to cases of recovery from legal representatives of an assessee .. 268

———S. 46 (5-A)—Recovery of tax by notice to third parties who hold any amount due to the assessee—Bank allowing overdraft to assessee—Constituent—If a debtor of the assessee .. 34

INDUSTRIAL DISPUTES ACT (XIV OF 1947), S. 25-G—Scope—Industrial Establishment—What constitutes—Retrenchment due to reorganisation of methods of business—Whether made in good faith—Principles of social justice—If relevant factors .. 360

———S. 33 (as amended by Act (XXXVI of 1956)—Construction—Permission of Tribunal sought by employer to punish employee—Power of the Tribunal to go into the question of the degree of punishment .. 164

INDUSTRIAL DISPUTES (APPELLATE TRIBUNAL) ACT (XLVIII OF 1950), Ss. 7 (1) (a) and 9 (7)—Powers of Appellate Tribunal to interfere with order of Industrial Tribunal—" Question of law "—Order of dismissal of employee by employer after full inquiry for misconduct—Allegation of want of *bona fides* and victimisation found against—Power of Tribunal to go into justness of punishment inflicted by employer and set it aside for sake of harmony in relations between employer and employee and for securing industrial peace—Contractual obligations of employee—Binding character of—Industrial Disputes Act (XIV of 1947), Ss. 10 and 11 .. 11

INTERPRETATION OF STATUTES—Retrospective operation—Statute of limitation—Rule .. 30

LAND ACQUISITION ACT (I OF 1894), Ss. 18 and 31—Acceptance of compensation without any protest—If amounts to an acceptance of the award and bars a reference under section 18 on a question of quantum of compensation .. 27

———S. 23 (1), *Fourthly*—Injuriously affecting property—Acquisition for building houses for persons owning cattle—Probable damage to crops on claimant's adjacent property by the cattle—Cost of fence in determining compensation under the Act .. 327

LETTERS PATENT (MADRAS), Cl. 15 and Appellate Side Rules (Madras), R. 95—Applicability—Order refusing to amend the decree in second appeal—Appeal against leave of Judge whose order was appealed against—Necessity .. 337

LIMITATION ACT (IX OF 1908), S. 5—Delay in applying for special leave under S. 417 (4), Criminal Procedure Code—If could be excused .. 388

———S. 13—Applicability—Cause of action arising outside India—Period of absence of the defendant—Whether can be excluded in computing limitation .. 396

———S. 18—Scope—Extension of period of limitation in case of fraud—Application to set aside sale in execution .. 260

———Arts. 31, 36 and 48—Applicability—Suit for damages for conversion .. 175

———Art. 131—Applicability and scope—Recovery of arrears of melwaram amount—Limitation .. 69

———Art. 132—Starting point of limitation—" While the money becomes due "—Interpretation of—Sale deed—Part of sale price left with vendee to meet liability under indemnity bond executed by one of the vendors to cover loss anticipated in regard to possibility of suit by minor children of vendor—Suit to recover unpaid purchase money more than 12 years after attainment of majority by youngest of minors—Maintainability—Deed—Construction — Clause in sale-deed—Interpretation .. 197

MADRAS AGRICULTURISTS RELIEF ACT (IV OF 1938)—Debt already scaled down under the Pudukottai Agriculturists Relief Regulation before merger—Application for scaling down under Act IV of 1938 after merger—Whether can be made .. 395

MAD. AGRI. REL. ACT (1938)—(*Contd.*)

———S. 3(ii), proviso (c)—Applicability to cases of house-tax levied under Pudukottai Regulation (III of 1925) .. 235

MADRAS BUILDINGS (LEASE AND RENT CONTROL) ACT (XXV OF 1949), S. 9—Change of name of institution-landlord after an order of eviction is made—Execution of the order under the old name—If can be continued .. 255

———S. 12-B—Revisional powers—Scope of—Interference—Grounds—Application for eviction on grounds of wilful default of tenant in payment of rent and on ground of *bona fide* requirement of landlord for own occupation—Concurrent finding of wilful default by Rent Controller and Appellate Authority and order of eviction—District Judge setting aside order and remanding case for fresh disposal on grounds that the second ground also should have been gone into—Propriety and legality of remand—Civil Procedure Code (V of 1908), S. 115—Scope—Remand — Discretion—Exercise of—Principles .. 77

MADRAS CINEMAS REGULATION ACT (IX OF 1955), Rules under, R. 109 (1)—Applicability and construction—Madras Places of Public Resort Act (II of 1888), S. 7—Licence issued under—Issue of fresh licence within three months, if barred—"Site"—Meaning of—Erroneous construction by Board of Revenue—Interference by writ of *certiorari* when decision is correct—Rule—Constitution of India (1950), Art. 226—Jurisdiction of High Court—Rule 4 of the Rules under Cinemas Act—If binds High Court .. 410

———S. 5—Scope of .. 352

MADRAS CITY CIVIL COURT ACT (VII OF 1892) (as amended in 1955), S. 6—Transfer of suit from Original Side to City Civil Court—Court-fee .. 263

———(as amended by Madras Act X of 1955), S. 15 (2)—Suit for account valued at below Rs. 5,000—Decree for an amount higher—Forum of appeal .. 9

MADRAS CITY TENANTS PROTECTION ACT (III OF 1922), Ss. 7-A, 8 and 9 and Amending Act (XIX of 1955), S. 10 (1)—Effect of amendment on decrees in ejectment which have not been executed—Tenant—When can take advantage of the Act—Rule of limitation—Delay—If could be excused—Fair rent—When could be determined .. 286

———S. 9 (1), *Explanation*—"Land"—Meaning of—Lessee — Interest of—If capable of being transferred—Ejectment petition by lessee against sub-lessee—Application by sub-lessee under S. 9 (1)—Maintainability—Owner of land—If necessary or proper party .. 310

MADRAS COURT-FEES ACT (XIV OF 1955)—Appeal against order determining mesne profits—Valuation for purposes of appeal—Civil Procedure Code (V of 1908), O. 20, R. 12—Decree for mesne profits under—If a final order .. 99

MADRAS COURT-FEES AND SUITS VALUATION ACT (XIV OF 1955), S. 12—Right of defendant to raise objection as to Court-fee—Scope of .. 21

———S. 12 (2)—Objection by defendant relating to Court-fee—If could be raised only in the written statement .. 308

MAD. COURT-FEES & S. V. ACT (1955)—(*Contd.*)

———Ss. 50 and 51—Court-fee payable in an appeal against an order rejecting a petition for leave to sue *in forma pauperis* and rejection of plaint for non-payment of Court-fee .. 97

MADRAS CULTIVATING TENANTS (PAYMENT OF FAIR RENT) ACT (XXIV OF 1956), Ss. 4, 5, 6 and 7—Applicability and scope of—Application for division of produce—Maintainability before fixation of fair rent—Waram agreements for payment of 60 per cent. of gross produce executed before Act—If becomes totally void on coming into force of Act—Right of landlord to claim 40 per cent. in kind until fixation of fair rent .. 414

MADRAS CULTIVATING TENANTS PROTECTION ACT (XXV OF 1955), S. 2 (a)—"Cultivating tenant"—Tests for determining .. 272

———S. 3 and Provincial Insolvency Act (V of 1920), S. 55—Eviction of tenant on the ground of arrears of rent—Original landlord adjudged insolvent—Leased lands vesting in Official Receiver—Payments made *bona fide* to the former landlord—If binding on Official Receiver—Scope of .. 424

———S. 3 (4) (b)—Eviction on the ground of default or failure to deposit rent—Need for strict adherence to the wording of the statute—'Deposit' if equivalent to pay or tender. 26

———S. 4 (5)—Application by dispossessed person for restoration to possession—Where maintainable .. 394

———S. 6-A—Applicability—Suit for possession—Defence that person, in possession is a 'cultivating tenant'—Procedure .. 427

———and (XIV of 1956), S. 6-A—Transfer of pending proceedings before Civil Courts—Nature of finding of Civil Courts—Procedure .. 232

———S. 6-A—Transfer of suits by Civil Court—When could be made—Cultivating tenant entitled to the benefits of the Act—Scope of .. 208

———S. 9 (2)—Appeal under—'Every decision of a Rent Court'—If includes decisions on interlocutory applications as well .. 400

MADRAS DISTRICT MUNICIPALITIES ACT (V OF 1920), Ss. 44 (2) and 45—Electoral rolls for municipal elections—Power of Government to direct revision—Scope of—Rules for decision of election disputes under—Rule 2—Time for presentation of election petition. 419

———Ss. 244 and 249—Scope—Premises (like railway platform) in the control and occupation of the Union Government—Private individual carrying on trade thereon—Weather exempt from the levy of licence fee .. 348

———S. 270—Running a lorry-stand within a municipality without a licence—What amounts to .. 87

———S. 354 (2)—Bar of civil suits—Scope and extent of—Municipal assessment based on proper enquiry—Correctness of the quantum of assessment—If could be questioned in Civil Court .. 73

———S. 354 (2)—Scope—Jurisdiction of Civil Court—When can be invoked to set aside assessment—S. 82—Annual rental value—Ascertainment of rent—General principles .. 217

MADRAS DISTRICT POLICE ACT (V OF 1861), S. 53—Prior notice of intended action against police official—Not required for criminal prosecution .. 162

MADRAS ESTATES (ABOLITION AND CONVERSION INTO RYOTWARI) ACT (XXVI OF 1948)—Notification under—Effect of—Inam village forming part of parent estate—Vesting in Government—Government treating village as under-tenure or intending to take it over as such—Effect of .. 322

———S. 3 (*b*) and (*e*)—Scope .. 273

———S. 23 (*a*) (ii)—Applicability, scope and effect—Estate village—Thirishvekam grant—Allowance paid by adjusting share of allowance of holder to rent payable by him on holdings in estate—Village subsequently brought under Madras Act (XXVI of 1948)—Effect—Liability for rent—Determination—Claim based on old contract—Sustainability—Right to claim adjustment of allowance towards rent—"Rent"—Madras Estates Land Act (I of 1908), S. 3 (ii). 413

———S. 42—Estate taken over by Government—Inam grant of a portion of melwaram—Claim for share of compensation by inamdar—Creation of charge on the estate .. 69

MADRAS ESTATES LAND ACT (I OF 1908), S. 6-A—Scope—Kudiwaramdar acquiring the melwaram interest in his holding—Nature of interest—Madras Estates (Abolition and Conversion into Ryotwari) Act (XXVI of 1948), S. 3 (*b*) and (*e*)—Whether the interest stands transferred to the Government on the estate being notified entitling the holder for compensation—S. 44 (1)—Apportionment of compensation—Scope and extent of powers of the Tribunal under the Act .. 273

MADRAS GENERAL SALES TAX ACT (IX OF 1939) and Article 286 of the Constitution of India (1950)—Sales of goods under a contract providing for the passing of goods at a later stage—Sale if exempt from tax .. 225

———S. 5 (*vi*) and Madras General Sales Tax Rules, Rule 5 (as amended) and Turnover and Assessment Rules, Rule 16 (as amended) and S. 9 of Act I of 1957—Expression 'Prescribed' in the Act—Whether connotes only prospective and not retrospective operation of the Rules—Whether the Rules violate Art. 14 of the Constitution—Whether the Rules violate the basic principle of single point taxation under S. 5 (*vi*) of the Act .. 132

———S. 17 (2)—Applicability—Protection under—If applies to reckless acts of officers. 206

MADRAS GENERAL SALES TAX RULES, (1939), rule 17 (1) (as amended in 1953)—If retrospective—Assessment completed before amendment—Amendment giving extended period for re-assessment coming into force before expiry of original period of limitation—Re-assessment within extended period—Legality. . 30

MADRAS HIGH COURT (APPELLATE SIDE) RULES, rule 41-A (2)—If *ultra vires*—Excusing delay in the presentation of a petition—Sufficient cause—What amounts to .. 300

———Rule 95 —Applicability .. 337

MADRAS HINDU RELIGIOUS AND CHARITABLE ENDOWMENTS ACT (XIX OF 1951), S. 3—Validity—If void as amounting to excessive delegation of legislative power—

MAD. H. R. & C. E. ACT (1951)—(*Contd.*)
If opposed to Article 14 of the Constitution of India .. 248

———Ss. 39 and 42—Effect of on schemes framed earlier—Qualification of trustees under earlier scheme—If could be overlooked—Misconduct of one of the members of the family of hereditary trustees—If abrogates the rights of other members to become hereditary trustee. .. 421

———S. 52 (1) (*ii*)—Right of suit within 90 days to set aside an order—Period how computed—Order—Meaning of .. 285

———S. 57, 62, 87 and 93—Scope and effect of—Certificate under section 87—Effect of—Enforcement of—Powers of Magistrate—Remedy of party aggrieved—Suit under section 62—Application for injunction restraining execution or enforcement of certificate—Maintainability .. 312

———S. 62 (1) and Civil Procedure Code (V of 1908), Order 39, rules 1 and 2—Jurisdiction of Civil Court to grant injunction in appropriate cases—If ousted in suits under section 62 (1) of Madras Act (XIX of 1951) .. 256

———S. 87—Scope of—Proceedings for delivery under certificate—Nature—Jurisdiction of Magistrate to go behind certificate—Plea that person in possession was not a trustee and that the property was held as inam burdened with service—If can be entertained or gone into. 314

MADRAS TOWN PLANNING ACT (VII OF 1920), S. 12—Acquisition of land—Power of Government to extend the time fixed under—Effect of such extension—Quantum of compensation—Crucial date to decide .. 253

MADRAS VILLAGE PANCHAYATS ACT (X OF 1950), S. 96 (3)—Application for a licence —Orders not communicated within thirty days by the Panchayat—Legal effect of .. 161

MALICIOUS PROSECUTION — What amounts to—Foundation of action for damages—Onus of proof—Factors to be proved in a suit for damages for malicious prosecution .. 79

MERGED STATES (LAWS) ACT (XXV OF 1949), Ss. 4, 5, 6 and 7—Effect of—Merger of former State of Pudukottai in Madras—Applicability of Madras enactments—Principle of construction—Effect of prior corresponding law .. 235

MOTOR VEHICLES ACT (IV OF 1939), S. 64-A—Power of Government under—If can pass an order in revision which the original Tribunal had no jurisdiction to pass .. 1

———S. 130 (1) and Penal Code (XLV of 1860), S. 279—Prosecution for an offence of rash and negligent drying under section 279, Penal Code—If could be proceeded under S. 130 (1) of the Motor Vehicles Act .. 243

MUHAMMADAN LAW—Gift—Delivery of possession—Proof—Onus—Declaration by donor in deed—Effect of .. 14

PENAL CODE (XLV OF 1860), S. 292—Offence of publishing obscene matter—What constitutes—Mere defamatory article—If by itself amounts to obscene matter also .. 8

PRACTICE—Directions given by the High Court (in a pending second appeal) to the lower Court to determine the quantum of money to be paid to a claimant—Subsequent disposal of the second appeal itself—If takes away the power of the lower Court to determine the quantum. 181

———Duty of Court not to make observations on merits of pending proceedings .. 210

———Issues—Absence of specific issue on plea—If bar to consideration of plea by Court for basing decision .. 14

———Leave to sue *in forma pauperis*—Refusal of—Failure to pay Court-fee within time granted—Rejection of O.P.—Remedy of plaintiff—If could file a revision against the original order of refusal of permission to sue as a pauper—Appeal—If proper remedy .. 97

———Order for furnishing security as condition of granting stay—Object of—Security of immoveable property directed to be furnished before a specified date—Compliance with—What amounts to .. 330

———Suit on promissory note—Books of money-lenders presumed by trial Court to be faked—Summary rejection and disregard of oral and documentary evidence—Propriety and legality .. 93

PREVENTION OF FOOD ADULTERATION ACT (XXXVII OF 1954), Ss. 16 (1) and 17 (1)—Offence committed by a company—Person in charge of the company—Liability of .. 20

RAILWAY MOBILE COURT—Procedure to be adopted by Honorary Magistrates—Examination of accused under S. 342, Criminal Procedure Code (V of 1898)—Necessity for .. 242

RAILWAYS ACT (IX OF 1890), Ss. 55 and 56 and condition 10 of the forwarding note—Right of Railway Management to sell the goods consigned—When can be exercised—Duty to give notice—If can be contracted out of—Suit for damages for conversion—Limitation for—Limitation Act (IX of 1908), Arts. 31, 36 and 48 .. 175

———S. 121—Offence under—Refusal of a passenger to show the ticket when demanded—If amounts to impeding a railway servant in the discharge of his duty .. 242

REPRESENTATION OF THE PEOPLE ACT (XLIII OF 1951), Ss. 36 and 100 (1) (*c*)—Election Petition to set aside election on the ground of improper rejection of nomination—Scope of enquiry by Tribunal—New objection to nomination—If could be taken .. 124

REPRESN. OF THE PEOPLE ACT (1951)—(*Contd.*)

———(as amended by the second Amendment Act XXVII of 1956), Ss. 81 and 90 (1)—Powers and jurisdiction of Election Tribunal—Amendment introducing new facts applied for after expiry of period prescribed for filing petition—Order allowing—Jurisdiction—Interference by writ of *certiorari* .. 110

———(as amended by Act XXVII of 1956), S. 82 (*a*)—Parties to an election petition—Whether the expression ' contesting candidates ' includes candidates retiring under section 55-A (2)—S. 117—Deposit of security for costs—Requirements .. 139

———Ss. 82 (*b*), 90 (3) and 123 (1)—Any candidate against whom allegations of any corrupt practice are made—Who is—If includes the person who is alleged to have received the bribe—Such persons if necessary parties to an election dispute petition—Scope of section 123 (1)—Power of Election Tribunal to allow amendment by addition of parties—Change in law by Act (XXVII of 1956)—Civil Procedure Code (V of 1908), Order 1, rule 10—If applicable. 61

———S. 117—Deposit of security for costs—Requirements for validity .. 139

SALE OF GOODS ACT (III OF 1930), S. 23—Property in unascertained goods—When would pass—Intention of parties to the contract. 294

STAMP ACT (II OF 1899), Arts. 19 and 33 (*b*) of Schedule I-A (Madras Amendment)—Deed of dissolution of partnership—Partner relinquishing his interest in the partnership properties—If amounts to conveyance. (F.B.) 88

———Sch. I-A, Art. 25 (as amended by Madras Act VI of 1922)—Person enrolled as an advocate of the Mysore High Court seeking enrolment in the Madras High Court—Exemption from Stamp Duty payable—Whether can be claimed .. 189

TANJORE TENANTS AND PANNAIYAL PROTECTION ACT (XIV OF 1952), S. 13 (1) and (2) and Madras Cultivating Tenants Protection Amendment Act (XIV of 1956), Ss. 10 and 11—Effect of later Act on proceedings under earlier Act .. 317

TRADE MARKS ACT (V OF 1940), Ss. 20 and 73—Scope—Forum for institution of suits—If section 73 applies to passing-off actions also—City Civil Court—If has jurisdiction. 355

TRANSFER OF PROPERTY ACT (IV OF 1882), S. 3—Notice—Abstention from enquiry—Effect of .. 188

ERRATA

In (1958) 1 M.L.J. 400 and in (1958) 1 M.L.J. (N.R.C.) 52 in the head-note please substitute "Madras Cultivating Tenants (Payment of Fair Rent) Act" for "Madras Cultivating Tenants Protection Act."

NOTES OF RECENT CASES.

			Page.
Abdul Kassim *v.* I. T. O., Karaikudi		..	10
Aboobucker *v.* Kunhamoo		..	40
An Advocate, *In re*	(F.B.)	..	60
Ahmad Mohideen Khan, *In re*		..	11
Alagammai Achi, *In re*		..	14
Annamalai Ayee Chatram *v.* Ramabadhra Vandayor		..	28
Artisan Press *v.* I. T. O., Madras		..	9
Arumugha Goundar *v.* Natchimuthu Pillai		..	29
Asher Textiles *v.* Industrial Tribunal, Coimbatore		..	12
Athmanatha Thevar *v.* Rangaswami Thevar		..	59
P. Balakotiah *v.* Union of India	(S.C.)	..	1
T. M. Basappa *v.* D. Ayyappa	(S.C.)	..	58
Board of Revenue, Madras *v.* Madalai Nadar and Co.	(F.B.)	..	5
Board of Revenue *v.* Simson & McConochie, Ltd.	(F.B.)	..	60
Bombay Dyeing and Mfg. Co *v.* State	(S.C.)	..	3
C. I. Spinning and Mfg. Co. *v.* Wardha Municipality	(S.C.)	..	3
C. V. Naidu *v.* A. V. Jagadisa Nadar		..	25
Chandranath Mukherjee *v.* Tusharika Debi	(S.C.)	..	49
Changalvaroya Chetty *v.* State		..	11
J. K. Chaudhuri *v.* R. K. Dutta Gupta	(S.C.)	..	53
Chidambaram *v.* Muthu Kumaraswami		..	33
Chidambaram *v.* Rathinam		..	20
Chintaman Rao *v.* State of Madhya Pradesh	(S.C.)	..	37
Coimbatore Municipality *v.* Narayanan		..	36
Current Circulating Library *v.* Raja Veluggoti Yadandra		..	8
Depty Lal *v.* Collector of Nilgiris		..	64
Durairajan *v.* Sivagnanam		..	29
Express Newspapers *v.* Union of India	(S.C.)	..	47
Fathima Bi, *In re*		..	15
Fernandez, *In re*		..	63
Gemini Pictures Circuit *v.* Commissioner of Income-tax		..	13
Ghazani Md. Sahib *v.* Official Receiver		..	15
Gorilan, *In re*		..	20
Govindan, *In re*		..	22
Govindaswami, *In re*		..	21
Govindaswami *v.* Ramaswami		..	27
Jagannath Behara *v.* Raja Harihar Singh	(S.C.)	..	2
Jagannathan, *In re*		..	20
Janakiram *v.* Nagammal		..	5
V. D. Jingan *v.* State of U. P.	(S.C.)	..	2
Kaliammal *v.* Pongiammal		..	42
Kamaraja Nadar *v.* Kunju Thevar, etc.	(S.C.)	..	57
Kandaswami Goundan, *In re*		..	46
Kandaswami Mudaliar *v.* Panchayat Board, Tallakulam		..	30
Kashi Bai *v.* Sudharani Ghosh	(S.C.)	..	38
Kashinath Sankarappa Wani *v.* New Akot Cotton Ginning and Pressing Co.	(S.C.)	..	37
Kasturi and Sons *v.* N. Salivateeswaran	(S.C.)	..	47
Khem Chand *v.* Union of India	(S.C.)	..	2

		Page.
Kothandaraman *v.* Chief Conservator of Forests		56
C. M. Kothari *v.* Commissioner of Income-tax		63
Krishnamurthi, *In re*		4
Kunchithapatham *v.* Ranganadham		16
Kuppuswami *v.* Ketty Muthu		52
Kuppuswami *v.* Sri Subramaniaswami Devasthanam		21
Kurikose *v.* Kurikose		30
Lion Automatic Service *v.* State Transport Authority		46
M. Ct. M. Corporation, Ltd *v.* Income-tax Officer, Pudukottai		41
Madurai Municapality *v.* Rangaswami		13
Mahaboo Bivi *v.* Abdul Hameed		62
Mahadayal Premchandra *v.* C. T. O., Calcutta	(S.C.)	54
Manickavasagam *v.* I. T. O., Coimbatore		8
Maragathammal *v.* Dharma Goundan		18
Mararji *v.* Nallayya		19
Marey Joseph *v.* Jayub Mohamed		59
Marudayee *v.* Malla Govindan		30
J. C. Mary, *In re*		16
Meenal *v.* Subbiah Naidu		5
Mithan Lal, etc *v.* State of Delhi	(S.C.)	53
Mohd. Hanif Quareshi *v.* State of Bihar	(S.C.)	58
Monjee Gopalajee, *In re*		21
Munia Servai *v.* Hanuman Bank, Ltd.		50
Murugayya Pillai *v.* Seethalakshmi		44
Muthukrishna *v.* Meenakshi		7
Muthuramalinga Thevar *v.* State		45
Muthusethurayar *v.* Lourduswami		45
Muthuswami Gurukkal *v.* Ayyaswami Thevan		27
Nagammal *v.* Govindarajulu		9
Nagaraja Dikshithar *v.* Sundaresa Sastrigal		61
Nagendranath Bora, etc. *v.* Commissioner of Hills Division	(S.C.)	24
Nagpur Electric Light and Power Co. *v.* Shreepat Rao	(S.C.)	53
Nallasivam Chettiar *v.* Avudayammal		6
Narasimhalu Chettiar *v.* Muthuswami Goundar		12
Narayana Ayyar *v.* Veerankutti		33
Narayanaswami *v.* Krishnamurthi		41
Narayanaswami *v.* Mohan Prasad		51
Narayanaswami Chettiar, *In re*		6
Nataraja Pillai and Co, *In re*		11
Palaniappa Chettiar and Co. *v.* The Dy. Commercial Tax Officer		17
Panchapakesan *v.* Revenue Board		43
Parthasarathi Naicker, *In re*		14
K. C. Pokhraj *v.* State of Bombay	(S.C.)	48
Poorna Chinna Basaviah *v.* Rama Iyer and Bros.		46
Premchand Motichand *v.* Hameed Sultan		32
Public Prosecutor *v.* Anthony		15
Public Prosecutor *v.* Sami Venkataraman		4
Puspavathi *v.* Narayana		61
Pyarelal Hari Singh and Co. *v.* State of Punjab	(S.C.)	53
Rahamath Bi *v.* Ahmed Mohideen		60
Raigarh Jute Mills Ltd. *v.* Eastern Railway	(S.C.)	49
Raja Ganga Pratap Singh *v.* The Allahabad Bank, Ltd.	(S.C.)	23
Rajalakshmi Ammal *v.* Muthuswami Gounder		50
Ramakrishna Dalmia *v.* Justice S. R. Tendolkar	(S.C.)	48
Raman *v.* Public Prosecutor		14
Ramanathan Chettiar *v.* Somasundaram Pillai		36
Ramanuja Naiker *v.* Seethalakshmi Ammal		62

			Page.
Ramaswami v. State of Madras		..	40
Ratna Mudaliar v. R. O. Cantonment Board, St. Thomas Mount		..	43
Ravamanickkammal v. Ammani Ammal		..	35
Sales Tax Officer, Cuttack v. B. C. Patel and Co	(S.C.)	..	54
Santhanam v. Somasundaram		..	52
Sardar Syedna Tehar v. State of Bombay	(S.C.)	..	1
Sarojini v. Krishnamurthi		..	59
Seenu and Co v. State of Madras		..	64
Sellamuthu Chettiar v. Veerasikkiah Goundar		..	56
Seth Gangadhar v. Shankarlal	(S.C.)	..	55
Shanmugha Udayar v. Sarangapani Goundar		..	31
Sitaraman v. Pattabhiraman		..	51
Somasundaram v. Gopal		..	22
B. N. Srikantiah v. State of Mysore	(S.C.)	..	54
Srinivasa Pillai v. Kanniappa Pillai		..	51
K. S. Srinivasan v. Union of India	(S.C.)	..	37
State of Bihar v. Basawan Singh	(S.C.)	..	49
State of Kerala v. P. J. Joseph	(S.C.)	..	3
State of Madras v. Ganon Dunkerley and Co., Ltd.	(S.C.)	..	50
State of Madras v. Mohd. Ghani		..	41
State of Madras by Collector of Tanjore, *In re*		..	19
State of U. P. v. Tobit and others	(S.C.)	..	33
V. P. S. Subbiah Chettiar, *In re*		..	56
Subramania Udayar v. Board of Revenue, Madras		..	38
Subramanyam, *In re*		..	35
M. P. V. Sundararamier and Co v. State of Andhra Pradesh.	(S.C.)	..	39
Sundararamanjulu v. Kamalammal		..	27
Swami Aiya, *In re*		..	32
Swamiappa Mudaliar v. Ponnammal		..	62
Swamy v. Sultan		..	43
Syed Sahib v. Angamuthu Mooppan		..	19
Talab Haji Husain v. M. P. Mondkar	(S.C.)	..	24
Tata Iron and Steal Co v. State of Bihar	(S.C.)	..	37
Thangalaxmi v. Arunachalam		..	10
Thangiah v. Hanuman Bank (In Liquidation)		..	9
Thiruvengada Mudaliar v. Narayana Reddiar		..	61
Thiruvengadaswami v. Commissioner, Hindu Religious and Charitable Endowments, Madras		..	31
Umapathi v. Panchaksharam		..	44
Veluchami, *In re*		..	55
Velu Pillai v. Sevugaperumal		..	42
Vengali Ramunni Menon v. The Joint Official Liquidators of Premier Hosiery Works, Ltd.		..	25
S. A. Venkataraman v. State	(S.C.)	..	2
Venkataraman and Co v. Union of India		..	7
Virsa Singh v. State of Punjab	(S.C.)	..	40
Viswanathan Chettiar, *In re*		..	34
White v. White	(S.C.)	..	39
Workmen of Assam Co. v. Assam Co, Ltd.	(S.C.)	..	49
Workmen of Dimakuchi Tea Estate v. Dimakuchi Tea Estate	(S.C.)	..	23

INDEX OF RECENT CASES.

ADMINISTRATION OF EVACUEE PROPERTY ACT (XLIV OF 1954), S. 29—Property of an evacuee in possession of a tenant transferred to another—Transfer—When takes place .. 64

BANKING COMPANIES ACT (X OF 1949)—Jurisdiction of High Court under—If Ordinary Original Civil Jurisdiction—Execution of order under—Limitation for—Limitation Act (IX of 1908), Article 183—Applicability .. 50

———Ss. 45-B and 45-C—Transfer of pending proceedings to High Court—Scope of .. 9

BENGAL FINANCE (SALES TAX) ACT as extended to Delhi—Vires—Article 246 of the Constitution of India (1950)—Part C States (Laws) Act (S.C.) .. 53

BENGAL TENANCY ACT (VIII OF 1885) Ss. 15 and 16. (S.C.) 49

BIHAR SALES TAX ACT (XIX OF 1947) as amended in 1948, S. 2 (g)—Constitutional validity and scope (S.C.) .. 37

BOMBAY LABOUR WELFARE FUND ACT OF 1953, S. 3 (2) (a) and (b)—Constitutional validity—Articles 19 (1) (f) and 31 (2) of the Constitution—Payment of Wages Act (IV of 1936), sections 8 and 15—Contract Act (IX of 1872), section 56—Limitation Act. (S.C.) .. 3

BOMBAY SALES TAX ACT (1946)—Bombay Repealing Act of 1953, S. 48 (2)—Scope—Sanction for prosecution. (S.C.) .. 48

CANTONMENT ACT (II OF 1924), S. 203—Power of a Cantonment Board to levy license fees for opening of a market—If includes a right to collect licence fee for renewal of licence. 43

CATTLE TRESPASS ACT (I OF 1871), Ss. 11 and 24—Applicability to trespass on reserved forest land .. 14

C.P. AND BERAR MUNICIPALITIES ACT (II OF 1922), Ss. 66 (1) and 83 (2)—Construction—"Imported into or exported from limits of Municipality." (S.C.) .. 3

CIVIL PROCEDURE CODE (V OF 1908), S. 11—"Heard and finally decided"—Issue or matter arising in pleadings of defendant not adjudicated upon—Court considering some pleas raised by defendant unnecessary for deciding suit in favour of plaintiff—Decision in suit—If *res judicata* in subsequent suit on same questions raised therein—Adverse decision on pleas—If implied by reason of decree in plaintiff's favour—Transfer of Property Act (IV of 1882), section 41—Applicability—Estoppel by representation and conduct .. 25

———S. 113—Reference to High Court—Duty of subordinate Court .. 19

———S. 115—Jurisdiction under—If could be invoked—Where an appeal lies .. 14

C. P. CODE—(*Contd.*).

———S. 115, proviso—Scope—Definition of "debt". (S.C.) .. 23

———S. 148—Power of Court under .. 51

———S. 152 and Or. 41, Rr. 11 and 32—Power of Court which passed a decree to amend the same—Effect of dismissal of an appeal *in limine* .. 59

———O. 18, R. 18—Local inspection by Court—Notes of local inspection—Duty to make and keep it as part of the record—Failure to do so—If vitiates the judgment .. 42

———O. 20, R. 7—Provisions if mandatory. 15

———O. 20, R. 11 (2) and S. 47—Order on an application for payment of decree amount in instalments—If appealable under S. 47 of the Code .. 6

———O. 23, R. 1—Scope. (S.C.) .. 58

———O. 39, Rr. 1 and 2—Jurisdiction to issue injunction—If ousted in suits under S. 62 (1) of Madras Act (XIX of 1951) .. 27

———O. 39, R. 1 (a)—Property in dispute in danger of being wrongfully sold in execution of a decree—Interim injunction—If could be ordered against a person who is not a party to the main suit .. 40

———O. 40, R. 1—Power of Court to appoint Receiver in simple money suits—Scope and extent of .. 50

CIVIL SERVICES CLASSIFICATION, ETC., RULES, R. 17 (b)—Applicability to termination of probation of civil servants .. 56

CIVIL SERVICES (TEMPORARY SERVICES) RULES (1949)—Quasi-permanent service. (S.C.) .. 37

COCHIN ABKARI ACT (1077) 1902—Constitutional validity—Articles 14 and 19 (1) (g) of the Constitution of India—Impost not authorised by law. (S.C.) .. 3

COMMERCIAL DOCUMENTS EVIDENCE ACT (XXX OF 1939)—Scope. (S.C.). 37

COMMISSIONS OF INQUIRY ACT (LX OF 1952)—Validity of the Notification appointing a Commission of Inquiry—Constitution of India (1950), Article 14. (S.C.) .. 48

COMPANY—Broker employed to procure business—Agreement to pay commission at agreed rate and income-tax on commission earned by him—Legality—Liability of company or liquidator in winding up to pay such tax—Companies Act (I of 1956), S. 200—Advance paid to broker at commencement of agreement—Right to demand repayment—When arises—Limitation—Limitation Act (IX of 1908), Article 89—Failure to claim deduction in suit by broker or commission—If bar to claim for deduction at final settlement .. 25

COMPANIES ACT (I OF 1956), S. 200—Advance paid to broker at commencement of agreement—Right to demand repayment—Limitation .. 25

CONSTITUTION OF INDIA (1950), Arts. 132 and 133—Certificate of fitness for appeal—If can be granted in respect of interlocutory orders—Appeal not competent under Art. 132—Grant of certificate—Effect. (S.C.) .. 1

———Art. 191 (1) (a) and (e)—Representation of the People Act (XLIII of 1951)—Office of profit—What amounts to—Employee of Life Insurance Company of India—If holds an office of profit under the Government of India—Regulation of the Corporation prohibiting its employees from standing for election—If amounts to a law disqualifying the candidate within the meaning of Article 191 (1) (e) of the Constitution. (S.C.) .. 41

———Arts. 226 and 227—Jurisdiction of High Courts—Limits. (S.C.) .. 24

———Art. 226—Jurisdiction under—Nature and scope of .. 44

———Art. 286—Scope and effect. (S.C.) 39

———Art. 286 (3)—Scope and effect .. 17

———Arts. 310 and 311—Civil Service (Temporary Service) Rules, 1949—Quasi-Permanent Service (S.C.) .. 37

———Art. 311—Scope. (S.C.) .. 1

———Art. 311 (2)—Government of India Act, 1935, S. 240—Scope. (S.C) .. 2

CONTRACT ACT (IX OF 1872), S. 56—Scope (S.C.) .. 3

COURT-FEES—Refund of—Memorandum of Appeal with deficit Court-fee—Returned and not re-presented—Appeal becoming unnecessary—Refund of Court-fee paid—When permissible .. 4

COURT-FEES ACT (VII OF 1870), S. 6 and Madras City Civil Court Act (VII of 1892), S. 16 (3) and Madras City Civil Court Amendment Act (X of 1955), S. 8—Transfer of suits from the Original Side of the High Court to the City Civil Court by virtue of the enhanced jurisdiction of the City Civil Court—If liable to levy of additional Court-fees in the City Civil Court, if there is any difference in the rates of Court-fees in the two Courts .. 33

———S. 7 (iv) (c) and Madras Court-fees and Suits Valuation Act (XIV of 1955), S. 25—Suit by landlord against a number of tenants of several items of land for appointment of a receiver on the ground that the tenant have entered into a conspiracy to remove the crops without paying his waram dues—Valuation for purpose of Court-fee .. 36

CRIMINAL LAW AMENDMENT ACT (XLVI OF 1952), Ss. 7 and 9 (6)—Special Judge acting under—Status of—If a Magistrate or Sessions Judge—Special Judge if could pronounce judgment on the basis of the evidence recorded by his predecessor in office—Criminal Procedure Code (V of 1898), section 350—Applicability to Special Judges under Central Act XLVI of 1952—Criminal Law Amendment Act (II of 1958), S. 8 (3-A)—Effect of new amendment .. 63

CRIMINAL PROCEDURE CODE (V OF 1898)—Madras Amendment Act (XXXIV of 1955)—Creation of a Sessions Court for Madras—Validity of—Power of Madras Sessions Court to transfer cases from the Court of one Presidency Magistrate to another .. 11

———Ss. 1 (2) and 403 (4) and Madras Village Courts Act (I of 1889) and the rules framed thereunder—Rule 31—Summary dismissal of a complaint by the village Court for failure of complainant to appear on the day fixed for hearing—If amounts to acquittal of the accused—Fresh charge-sheet filed subsequently before the regular Court in respect of the same matters under different provisions of the Penal Code (XLV of 1860)—If barred—Practice—Principle of .. 35

———Ss. 42, 54, 56 and 75 to 87—Scope—*See* Penal Code, Ss. 99 and 353 .. 32

———Ss. 146, 435 and 439—Proceedings under S. 145—Order of a Magistrate in pursuance of the finding of civil Court on a reference under S. 146—Revision against—Scope of .. 45

———Ss. 173 and 561-A—Scope. (S.C.). 2

———S. 247—Procedure under—Acquittal of an accused on the ground of absence of the complainant—Duty of Magistrate to exercise discretion .. 30

———S. 342—Examination of accused—Necessity for by Railway Mobile Courts .. 20

———S. 349 and Madras Borstal Schools Act (1926), S. 7 (1)—Submission of records by Magistrate under—Difference .. 55

———S. 417 (4)—Delay in applying for Special Leave—If could be excused—Limitation Act (IX of 1908), S. 5—Applicability .. 36

———S. 419—Limitation period—Filing of certified copies. (S.C.) .. 33

———S. 537 as amended by Act (XXVI of 1955)—Misjoinder of charges—Whether vitiates a trial .. 21

———S. 537—Scope. (S.C.) .. 54

———Ss. 561-A and 496—Inherent powers of the High Court—Limits. (S.C.) .. 24

CRIMINAL TRIAL—Excusing delay in filing appeal against acquittal—Right of the accused to contest .. 14

———Practice—Payment of compensation to the accused out of fine imposed on another accused—Legality .. 22

DEED—Construction—Gift of property equally in favour of two or more persons with a gift-over to the descendants of one of them—Gift-over—When will take effect—Death of one of the beneficiaries—Rights of the surviving beneficiaries—Theory of cross-remainder .. 27

DIVORCE—Acts of adultery—Concurrent finding of facts by Lower Courts—Interference with by the Supreme Court—When called for. (S.C.) .. 39

DIVORCE ACT (IV OF 1869), S. 36—Alimony *pendente lite*—Quantum of—Net average income—What is—Cost of the suit—Provision for—Circumstances to be taken into consideration .. 30

DRUG AND MAGIC REMEDIES (OBJECTIONABLE ADVERTISEMENTS) ACT (XXI OF 1954), S. 14 (d)—Power of State Government under to revoke a permission once granted—Nature of .. 64

EASTERN BENGAL AND ASSAM EXCISE ACT (1910), S. 9—Orders of Appellate authority—Whether administrative or judicial—Constitution of India (1950), Articles 226 and 227—Jurisdiction of High Court under—Limits (S.C.) .. 24

EAST PUNJAB GENERAL SALES TAX ACT (1948)—"Sale of goods"—Supply of the materials used in construction works. (S.C.) .. 53

ELECTIONS—Municipal Elections—Tribunals under—Power to allow further particulars. 10

ESSENTIAL GOODS (DECLARATION AND REGULATION OF TAX ON SALE OR PURCHASE) ACT (LII OF 1952), S. 3—Interpretation. (*See* Madras General Sales Tax Act, Ss. 3 and 5) .. 17

EXECUTION—Declaratory decree that the decreeholder will be entitled to certain sums the payment of which is charged on certain properties—No direction as to payment by judgment-debtors or sale of the charged properties in default of payment—Executability .. 62

FACTORIES ACT (LXIII OF 1948), S. 2 (l)—"Workmen"—Essentials to come under the definition of "workmen". (S.C.) .. 37

GAUHATI UNIVERSITY ACT—Powers of the University—If can interfere with order of governing body of a College dismissing its Principal. (S.C.) .. 53

GOVERNMENT OF INDIA ACT (1935), Sch. VII, List II, Entry 48—"Sale"—Meaning (S.C.) .. 50

———Sch. VII, List II, Entry 48—Scope—Sales of Goods Act (III of 1930)—Scope. 38

HINDU MARRIAGE ACT (XXV OF 1955), S. 28—Scope of—Proceedings under the Act—Appeal against order if lies—Revision against order—When lies .. 56

HINDU SUCCESSION ACT (XXX OF 1956), S. 14—Applicability and scope—Possessed of the property—Meaning of—Limited owner mortgaging property prior to Act—If entitled to the benefit of the Act .. 29

HUSBAND AND WIFE—Joint possession and enjoyment of properties as per compromise decree for maintenance and separate residence—Subsequent resumption of cohabitation—Effect of—Pending suit for partition and possession on the basis of the decree for separate residence and maintenance—Sustainability .. 7

INCOME-TAX ACT (XI OF 1922), S. 13—Method of accounting regularly employed—Duty of officer to accept in computing profits—Film industry—Amortisation of the cost of production—Depreciation value calculated at specified percentages for each year on a sliding scale—Adoption of a time basis—Legality—Circulars of C.B.R. D.O.R. Dis. No. 178—I.T. 137, dated 13th May, 1937 and C. No. 9 (48)—I.T. 48, dated 4th January, 1951—Construction of .. 13

———S. 16 (3) (*a*) (iii)—Scope of—Direct or indirect transfer of assets by husband to the wife—What amounts to .. 63

———S. 18-A (3) and (8)—Scope of .. 41

———S. 28—Applicability—Initation of proceedings for levy of penalty—What amounts to .. 9

INCOME-TAX ACT—(*Contd.*).

———S. 35—Scope of .. 8

———S. 46 (2)—Scope of—Recovery of arrears of tax by issue of certificate to the Collector—If applicable to cases of recovery from legal representatives of an assessee .. 10

INDUSTRIAL DISPUTES ACT (XIV OF 1947)—Payment of bonus—Computation. (S.C.) .. 49

———S. 2 (k)—"Industrial dispute"—Test. (S.C.) .. 23

———S 33—Petition by employer seeking permission to punish a workman for misconduct pending arbitration—Duty of Tribunal—Employer stating the nature of punishment proposed to be imposed, if irregular—Petition if liable to be rejected on that ground .. 12

INTERPRETATION OF STATUTES—C.P. and Berar Municipalities Act (II of 1922), Ss. 66 (1) and 83 (2)—Terminal Tax—Imported into or exported from limits of Municipality. (S.C.) .. 3

LEGAL PRACTITIONERS ACT (XVIII OF 1879)—Professional conduct—Advocate who has given opinion for one side in a criminal case—If could accept an engagement for the opposite side at a subsequent stage of the case. (S.C.) 60

LEGISLATION PROHIBITING SLAUGHTER OF COWS, ETC.—Validity—Bihar Act (II of 1956)—Uttar Pradesh Act (I of 1956)—C.P. and Berar Act (III of 1949)—Articles 13, 19, 25, 48, 245 and 246, Entry 15, List II of Seventh Schedule of the Constitution of India—Acts prohibiting slaughter of cows, etc.—Constitutional validity. (S.C.) .. 58

LETTERS PATENT (MADRAS), Cl. 15—Appeal against an order in an appeal against an appellate order of a Subordinate Court—Levy of Court—Necessity .. 61

LIMITATION ACT (IX OF 1908), S. 5—Applicability—Delay in applying for special leave under S. 417 (4)—If could be excused. 36

———S. 14—Scope—The Commercial Documents Evidence Act (XXX of 1939). (S.C.) 37

———S. 28—Adverse possession of a coal-mine. (S.C.) .. 38

———Arts. 31, 36 and 48—Applicability. 7

———Arts. 74 and 116—Covenant to pay a debt in instalments at stipulated period—Limitation how computed—Clause enabling creditor to sue for all the instalments together after the last instalment became due—If could extend the period of limitation .. 54

———Art. 156—Scope .. 14

———Art. 89—Applicability—Demand for repayment of advance paid to broker at commencement of agreement .. 25

———Art. 183—Applicability .. 50

MADHYA PRADESH INDUSTRIAL DISPUTES ACT—Discharge of employee under the Standing Orders of a Company—Legality. (S.C.) .. 53

MADRAS AGRICULTURISTS RELIEF ACT (IV OF 1938), S. 9-A—Transfer of mortgagees' interest during the specified statutory period—Exemption from scaling down—Object of—Scope of exemption .. 61

———and Amending Act (XXIII of 1948), S. 19 (2)—If applicable to decrees passed after the commencement of the original Act of 1938—'After the commencement of this Act'—Meaning of .. 27

MADRAS BORSTAL SCHOOLS ACT (V OF 1926), S. 7 (1) and Criminal Procedure Code (V of 1898), S. 349—Submission of records by a Magistrate under—Difference between. 55

MADRAS BUILDINGS LEASE AND RENT CONTROL ACT (XXV OF 1949) and Criminal Procedure Code (V of 1898), S. 476—Leave to prosecute for an offence relating to documents filed before Rent Controller—Leave refused—Remedy of party—If by way of civil or criminal revision .. 62

———S. 7 (2) (ii) (a)—Sub-letting by tenant without consent—What amounts to—Equitable mortgagee granting lease—Mortgagor owner—How far bound by the terms after redemption .. 8

———S. 7 (2) (iv)—Acts of nuisance—Use of indecent and vulgar language by tenant—If a ground for eviction—Ss. 12 and 12-B—Appellate authority—Duty to give reasons for interfering with orders of Rent Controller .. 5

———S. 7 (3) (a) and (c)—Difference between—Landlord requiring additional accommodation—Building residential—If could ask additional accommodation for non-residential purpose. 32

———S. 7 (3) (a) (i) and (iii)—Landlord requiring building *bona fide* for his own occupation—Building residential and non-residential—Application when could lie .. 20

———S. 9—Change of name of institution-landlord after an order of eviction is made—Executin of the order under the old name—Permissibility .. 11

MADRAS CINEMAS (REGULATION) ACT (IX OF 1955) and rules, Ss. 3 and 5 and R. 35—Scope of—Licensing of site and licensing of exhibition of film—If entirely independent of each other—Report of the local authority on suitability of site received after one month's time fixed under the rule—Effect. 29

———S. 5—Scope of .. 44

MADRAS CINEMAS REGULATION RULES (1957), Rr. 4 and 109 (1)—'Site'—Meaning of—Rule 4—If binding on the Court in the interpretation of the rules .. 38

———Rule 109 (1)—Scope of .. 43

MADRAS CITY CIVIL COURT ACT (VII OF 1892), S. 16 (3)—Transfer of suit from Original Side of High Court to City Civil Court—Additional Court-fee if payable. 33

MADRAS CITY POLICE ACT (III OF 1888), S. 71—Scope .. 16

MADRAS CITY TENANTS PROTECTION ACT (VI OF 1921), Ss. 7-A, 8 and 9 and Amending Act (XIX of 1955), S. 10 (1)—Effect of amendment on decrees in ejectment which have not been executed—Tenant—When can take advantage of the Act—Rule of Limitation—Delay—If could be excused—Fair rent—When could be determined .. 9

MADRAS COTTON CONTROL ORDER (1950) and Ordinance (I of 1955) and Madras Cotton Control Order (1955)—Carrying on business in raw cotton without license—If an offence during the period when Ordinance was in force .. 21

MADRAS COURT-FEES AND SUITS VALUATION ACT (XIV OF 1955), Ss. 28 and 53 (1)—Suit for possession of trust property—Pecuniary jurisdiction of Court—Determination of—Computation of Court-fee—One-fifth of the market-value of the property subject to a maximum fee of Rs. 200—Effect of Madras Civil Courts Act (III of 1873), section 12 .. 62

MADRAS CULTIVATING TENANTS (PAYMENT OF FAIR RENT) ACT (XXIV OF 1956), S. 7—Applicability—Scope of Act—Difficulties in administration .. 34

———S. 9 (2)—Appeal under—'Every decision of a Rent Court'—If includes decisions on interlocutory applications as well .. 52

MADRAS CULTIVATING TENANTS PROTECTION ACT (XXV OF 1955)—Scheme of the Statute—Suit for arrears of rent in civil Court against tenant within the meaning of the Act—When could lie—Power of civil Court to appoint Receiver—Scope of .. 12

———S. 2 (a)—Cultivating tenant—Who is. 16

———S. 3 and Provincial Insolvency Act (V of 1920), S. 55—Eviction of tenant on the ground of arrears of rent—Original landlord adjudged insolvent—Leased lands vesting in Official Receiver—Payments made *bona fide* to the former landlord—If binding on Official Receiver—Scope of .. 15

———S.3 (4) (b)—Order of Revenue Divisional Officer directing the tenant to tender the arrears of rent to landlord—Legality—When can be questioned .. 35

———(as amended by Madras Act XIV of 1956), S. 4 (5)—Cultivating tenant evicted in execution of decree—When entitled to be restored to possession .. 56

———and (XIV OF 1956), S. 6-A—Transfer pending of proceedings before Civil Courts to Revenue Court—Nature of finding of Civil Courts—Procedure .. 19

———S. 6-A—Transfer of suits by Civil Court to Revenue Court—When could be made—Cultivating tenant entitled to the benefits of the Act—Scope of .. 21

———Ss. 10 and 11—Effect on pending proceedings under Tanjore Tenants and Pannaiyal Protection Act (XIV of 1952) .. 28

MADRAS DISTRICT MUNICIPALITIES ACT (V OF 1920), Ss. 44 (2) and 45—Electoral rolls for municipal elections—Power of Government to direct revision—Scope of—Rules for decision of election disputes under R. 2—Time for presentation of election petition. 52

———Sch. V, clauses (n) and (q)—Cinder—If coal or combustible or explosive material. 13

MADRAS DISTRICT POLICE ACT (XXIV OF 1859), S. 50—'Charge' and 'Officer exercising the powers of a Magistrate'—Meaning of—If applies to departmental enquiries. 40

MAD. DIST. POLICE ACT—(Contd.)

———S. 53—Prior notice of intended action against police official—Scope of provision 5

MADRAS GENERAL SALES TAX ACT (IX OF 1939), Government of India Act (1935), Entry 48, List II of the Seventh Schedule—Meaning of the term "Sale". (S.C.) .. 50

———Tax on inter-state sales—Validity. (S.C.) .. 39

———(as amended by Amendment Act XVIII of 1955), Ss. 3 and 5—Madras General Sales Tax (Turnover and Assessment) Rules, 1939 (as amended in 1955), Rules 15 and 16—Scope—If invalid and *ultra vires*, as being "law imposing a tax"—Absence of sanction of President—Effect—Constitution of India (1950), Article 286 (3)—Essential Goods (Declaration and Regulation of Tax on Sale or purchase) Act (LII of 1952), section 3—"Law imposing or authorising the imposition of a tax"—Interpretation of—Rules framed under enactment—Machinery for assessment and collection of tax, if law imposing tax—Tests to determine .. 17

———Ss. 15 and 16—Levy of compounding fee—If bars a prosecution to pay the tax—Effect of repeal of S. 15 and substitution of another section .. 46

———S. 17 (2)—Applicability—Protection under—If applies to reckless acts of officers. 19

MADRAS HIGH COURT (APPELLATE SIDE) RULES, R. 48-A (2)—If *ultra vires*—Excusing delay in the presentation of a petition—Sufficient cause—When amounts to. 42

MADRAS HINDU (BIGAMY PREVENTION AND DIVORCE) ACT (VI OF 1949), (since repealed by Central Act XXV of 1955), S. 5 (8)—Provision as to custody of children while ordering dissolution of a marriage—Scope —Power of Court .. 59

MADRAS HINDU RELIGIOUS AND CHARITABLE ENDOWMENTS ACT (XIX OF 1951), Ss. 39 and 42—Effect of on schemes framed earlier—Qualification of trustees under earlier scheme—If could be overlooked—Misconduct of one of the members of the family of hereditary trustees—If abrogates the rights of other members to become hereditary trustee .. 33

———S. 62 (1) and Code of Civil Procedure (V of 1908), O. 39, Rr. 1 and 2—Jurisdiction of Civil Court to grant injunction in appropriate cases—If ousted in suits under S. 62 (1) of Madras Act (XIX of 1951) .. 27

———S. 62 (1) (ii)—Right of suit within 90 days to set aside an order—Period how computed—Order—Meaning of .. 31

MADRAS TOWN PLANNING ACT (VII OF 1920), S. 12—Acquisition of land—Power of Government to extend the time fixed under—Effect of such extension—Quantum of compensation—Relevant date to decide .. 11

MADRAS VILLAGE COURTS ACT (I of 1889) and rules thereunder—Rule 31—Summary dismissal of complaint on non-appearance—If acquital of accused—Fresh charge under Penal Code—If barred .. 35

MADRAS VILLAGE PANCHAYATS ACT (X OF 1950), Ss. 24, 29, 31, 33 and 34—Powers of the President of a Panchayat—President if could cancel a resolution of the Panchayat. 30

MOHAMEDAN LAW—Maintenance—Duty of father to maintain daughter—Extent of. 60

MOTOR VEHICLES ACT (IV OF 1939), Ss. 63, 64 and 64-A—Combined effect of—Right of revision—If available in cases where an appeal lies .. 46

———S. 116 and Madras City Police Act (III of 1888), S. 71—Rash and negligent driving—Liability for penalty and damages—Speed—When dangerous .. 16

———S. 130 (1) and Penal Code (XLV of 1860), S. 279—Prosecution for an offence of rash and negligent driving under section 279, Penal Code—If could be proceeded under S. 130 (1) of the Motor Vehicles Act .. 20

NEGOTIABLE INSTRUMENTS ACT (XXVI OF 1881), S. 87—Material alteration of an instrument—What is—Affixture of additional stamp to make up deficiency—If amounts to material alteration .. 51

OPIUM ACT (I OF 1878), S. 14—Search of a premises after sunset which is prohibited by the section—If affects the legality of the seizure and trial .. 15

ORISSA SALES TAX ACT (1947)—Extra-Provincial Jurisdiction Act, 1947—Pre and Post-Constitution Assessment periods—Article 286 of the Constitution—Bengal Finance (Sales Tax) Act, 1941. (S.C.) .. 54

ORISSA TENANTS PROTECTION ACT (III OF 1948), and Article 19 of the Constitution—Jurisdiction of revenue officer. (S.C.) .. 2

PAYMENT OF WAGES ACT (IV OF 1936), Ss. 8 and 15—Scope. (S.C.) .. 3

PENAL CODE (XLV OF 1860), S. 34 and Criminal Procedure Code (V of 1898), S. 537—Scope. (S.C.) .. 54

———Ss. 99 and 353 and Code of Criminal Procedure (V of 1898), Ss. 42, 54, 56 and 75 to 87—Sub-Inspector of Police given warrant to arrest the accused—Constable following the Sub-Inspector arresting the accused—Use of force by the accused against the Constable—If no offence—'Every person' in section 42, Criminal Procedure Code—If includes the Police Officers accompanying the authorised officer—Sections 54 and 56—Combined effect of—If affected by sections 75 to 87 .. 32

———S. 161—Evidence of raiders—Independent corroboration—Necessity. (S.C.) .. 49

———S. 279—Prosecution for offence under—If could be proceeded under S. 130 (1) Motor Vehicles Act (IV of 1939) .. 20

———S. 300, *Thirdly*—Scope—Gist of offence—Intention to cause death—If essential. (S.C.) .. 40

PRACTICE—Appeal—Limitation for—Computation of time—Decree amended—When gives rise to a fresh starting point of limitation—Limitation Act (IX of 1908), Art. 156 .. 14

———Appeal disposed of by a single Judge of the High Court—Subsequent petition for amendment of the judgment and decree filed—Letters Patent Appeal filed and dismissed *in limine*,

PRACTICE—(Contd.)

during the pendency of the petition for amendment—Power of Court to order amendment. .. 59

———Declaratory suits—If maintainable apart from S. 42, Specific Relief Act—Specific Relief Act (I of 1877), section 42—If exhaustive of the category of declaratory suits .. 61

———Directions given by the High Court (in a pending second appeal) to the lower Court to determine the quantum of money to be paid to a claimed—Subsequent disposal of the second appeal itself—If takes away the power of the lower Court to enquire into the earlier application .. 6

———Judgment and decree of lower Court bearing different dates—Appeal against—Maintainability—Procedure to be adopted by the appellant—Civil Procedure Code (V of 1908) O. 20, R. 7—Provisions if mandatory .. 15

———Order of a Civil Court granting sanction to prosecute for perjury—Appealable—If revision lies to the High Court .. 14

———Security directed to be furnished by Court as condition of granting stay—Furnishing of security—Object of—Security of immoveable property directed to be furnished before a specified date—Compliance with—What amounts to. 44

———Supreme Court—Concurrent findings of fact—Interference—When called for. (S.C.) 39

PRESIDENCY SMALL CAUSE COURTS ACT XV OF 1882). S. 38—New trial—When could lie. .. 46

PREVENTION OF CORRUPTION ACT (II OF 1947), S. 6—Criminal Procedure Code (V of 1898), Ss. 173 and 561-A—Scope. (S.C.) .. 2

———S. 6—Scope—A public servant—If includes one who has ceased to be in service—Previous sanction—If essential for taking cognizance of offence committed by such person (S.C.) .. 2

PREVENTION OF FOOD ADULTERATION ACT (XXXVII OF 1954), Ss. 10 (7) and 16 (1) (b)—Preventing an Inspector from taking sample—When an offence—Necessity for witnesses—When arises .. 4

PREVENTIVE DETENTION ACT (IV OF 1950), Ss. 10 and 11—Order of Government under section 11—Validity—Report of Advisory Board—Nature of—Reasons for the opinion—If should be given in the report—Proceedings under Article 226—If Court could go into the factual correctness of the grounds of detention .. 45

PROVINCIAL INSOLVENCY ACT (V OF 1920), S. 55—Eviction of tenant for arrears of rent—Adjudication of landlord as insolvent—Payments made to him if binding on Official Receiver .. 15

RAILWAY MOBILE COURT—Procedure to be adopted by Honorary Magistrates—Examination of accused under section 342, Criminal Procedure Code (V of 1898)—Necessity for. 20

RAILWAYS ACT (IX OF 1899), S. 28—Railway Rates Tribunal—"Undue preference." (S.C.) .. 49

RAILWAYS ACT—(Contd.)

———Ss. 55 and 56 and Condition 10 of the Railway Receipt—Right of Railway Management to sell the goods consigned—When can be exercised—Duty to give notice—If can be contracted out of—Suit for damages for conversion—Limitation for—Limitation Act (IX of 1908) Articles 31, 36 and 48 .. 7

———S. 121—Offence under—Refusal of a passenger to show the ticket when demanded—If amounts to impeding a railway servant in the discharge of his duty .. 20

RAILWAY SERVICES (SAFEGUARDING OF NATIONAL SECURITY RULES, 1949)—Constitution of India (1950), Articles 14 and 19 (1) (c) and 311. (S.C.) .. 1

REPRESENTATION OF THE PEOPLE ACT (XLIII OF 1951)—Office of profit—What amounts to—Employee of Life Insurance Corporation of India—If holds an office of profit under Government of India (S.C.) .. 41

———S. 7 (d)—Object of—Interest in a contract—What amounts to—Gift or loan of money to a contractor—If would amount to an interest in the contract .. 31

———Ss. 82 and 117—The term "contesting candidate" in the Representation of the People Act includes a candidate who has retired from the election contest after the last date for withdrawal but before the final poll is taken. (S.C.) .. 57

———S. 97—O. 23, R. 1, Civil Procedure Code—Scope. (S.C.) .. 58

RIPARIAN RIGHTS—Right of an ayacutdar to crossbund a flowing stream in a channel to irrigate his lands—Scope of rights of different riparian owners—Duty of Government to ensure water supply to riparian owners .. 41

SALE OF GOODS ACT (III OF 1930), "Sale"—Meaning. (S.C.) .. 50

SALES TAX—Sales-tax on Commission Agent—Procedure for getting 'instructions' from Assistant Commissioner. (S.C.) .. 54

SALES TAX LAWS VALIDATION ACT (VII OF 1956)—Validity and scope—Madras General Sales Tax Act (IX of 1939)—Article 286 of the Constitution. (S.C.) .. 39

SPECIFIC RELIEF ACT (I OF 1877), S. 27 (b)—Transferee for value without notice—'Paid his money'—Meaning of—If payment should be only in cash .. 59

———S. 42—If exhaustive of category of declaratory suits .. 61

STAMP ACT (II OF 1899)—Document whether lease or mortgage—Lease deed with a right of subrogation in favour of the lessee in respect of a mortgage discharged by the lessee by advancing the requisite amount as rent advance—Document if amounts to a mortgage. (F.B.) .. 60

———Arts. 19 and 39 (b) of Sch. 1-A (Madras Amendment)—Deed of dissolution of partnership—Partner relinquishing his interest in the partnership properties—If amounts to conveyance. (F.B.) .. 5

TANJORE TENANTS AND PANNAIYAL PROTECTION ACT (XIV OF 1952), S. 13 (1) and (2) and Madras Cultivating Tenants Protection Act (XXV of 1955), Amendment Act (XIV of 1956), sections 10 and 11—Effect of later Act on proceedings under earlier Act. 28

TRADE MARKS ACT (V OF 1940), Ss. 20 and 73—Scope—Forum for institution of suits—If S. 73 applies to passing-off actions also—City Civil Court—If has jurisdiction .. 43

TRANSFER OF PROPERTY ACT (IV OF 1882)—Clog on equity of redemption—Usufructuary mortgage for 85 years. (S.C.). 55

———S. 39—Applicability .. 18

T. P. ACT—(*Contd.*)

———S. 41—Applicability — Estoppel by representation and conduct .. 25

———S. 92 (3)—Subrogation—Nature of. (F.B.) .. 60

U.P. ZAMINDARS' DEBT REDUCTION ACT, (1951), S. 2 (*f*)—Arts. 14 and 228 of the Constitution of India (1950)—Civil Procedure Code (V of 1908), S. 113, proviso—Scope—Definition of "debt". (S.C.) .. 23

WORKING JOURNALISTS (CONDITIONS OF SERVICE) MISCELLANEOUS PROVISIONS ACT (1953)—Constitutional validity—Arts. 14 and 19 of the Constitution. (S.C.). 47

———S. 17—Scope of enquiry. (S.C.). 47